

AN INTERNATIONAL STRUCTURE FOR  
IMPLEMENTATION OF THE 1949 GENEVA CONVENTIONS:  
NEEDS AND FUNCTION ANALYSIS

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Introduction

"Freud views the atrocities of war as more natural than the civilized behaviour of man," and he considers that "what we call 'peace' is, apparently, a period during which forces both psychic and material are dammed up."<sup>1</sup>

Even if this be true, it is not necessarily the ultimate fate of mankind to continue to wage war in disregard of certain international norms which have been developed to manage violence and to limit the sufferings of the victims of war. It is more likely that mankind can and will have to constantly guard against the excesses of individuals, groups, governmental elites, or of themselves in their treatment of fellow human beings. A recent U.S. Army film, "The Geneva Conventions and the Soldier",<sup>2</sup> has pointed out that "[w]ar sometimes brings out the best in man--charity, compassion, self-sacrifice. Too often it brings out the worst--cruelty, brutality, sadism;" and the film declares that in war it is usually harder "to do the right thing than to do the wrong thing." Nevertheless, as the film emphasizes, the human society rightfully expects that a soldier's and a civilian's conduct during armed conflict shall conform to certain basic normative precepts known as the law of war. But why are these expectations of the international community not always realized in practice, and why is an uncivilized behavior sometimes allowed to reign supreme?

There seems to be no lack of documented legal policy (goal values), nor a lack of relevant basic expectations and demands of the international community concerning the rules for the waging of war or the protection of

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<sup>1</sup>Colby, "War Crimes," 23 Mich. L. Rev. 482, 626n. 213 (1925), quoting McCurdy, The Psychology of War. See also, "Is There a Bit of Calley In Us?", Look, June 1, 1971, at 76-77.

<sup>2</sup>See "My Lai Prompts New Training Film, Soldiers Get Vivid Lesson on Geneva Code," Los Angeles Times, April 26, 1971, at 1 and 12; and "What Army Is Doing to Prevent Another My Lai," U.S. News & World Report, April 12, 1971, at 6. The present author was a Pentagon adviser on this film.

human beings involved in an armed conflict. But these "rules" could, in many cases, be expanded to cover new situations with greater clarity. It is also evident that those who engage in armed violence could be made more aware of these expectations through a greater emphasis on education and tactical training at all levels of the various social groupings which populate our globe. Similarly, there does not seem to be lacking a human acceptance of the need for formal judgment or condemnation after the fact, though actual judgment is sometimes confused with an individual (or a more exclusive oriented) morality and is usually sparse, ad hoc and without the benefit of an established international sanctioning process. What seems a critical need, however, is not so much the creation of a highly centralized judicial and police machinery<sup>3</sup> as the need for a new focus. A focus not on rule formation or judgment, but on law effectiveness.<sup>4</sup> And there is a need

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<sup>3</sup>Such machinery might tend to be state elite dominated and unresponsive to more inclusive interests. See G. H. Gottlieb, *The Court of Man* (The Court of Man Foundation, 1973).

<sup>4</sup>The phrase "law effectiveness" should be explained. By this, the author means the actual effectiveness of law as an authoritative guide for the regulation of human conduct or the actual extent of an implementation of shared legal expectations into human conduct (a conjunction of authority and control). A focus on the actual effectiveness of law moves beyond inquiries into rule content or judgment (adjudication) and is useful for a "preventive law" orientation in that the focus considers the human response to rules or the degree of effective implementation of rules into human conduct (i.e., by asking such questions as: How does law function in the social context? What impact does a rule have on human conduct? Are the policies behind the rule effectively realized?). The focus on law effectiveness is a useful focus for a "preventive law" approach since considerations of law effectiveness are tied more to the ongoing social process and the impact of law on human actors than are focuses on appellate court decisions or any adjudicative process (since the latter are more after-the-fact or responsive in focus or at least not always attuned to what pragmatists might refer to as "actual practice" and the ongoing social events, needs, and expectancies). For a related use of the term "effectiveness", see Potter, Comment, "Bases and Effectiveness of International Law, 1968," 63 Am. J. Int'l Law 270-272 (1969). He states that most persons involved with international law are preoccupied with problems of rule content which are not at all as important today as the problems which concern "the bases and the effectiveness of the 'law' and what is to be done about it all," *id.* at 270. This is another way of stating, I suppose, that how and why rules are or are not implemented into actual conduct should be the most important concern for the international lawyer today. And others have also made a shift in focus toward inquiries into law effectiveness or law implementation in

for an expanded focus on all aspects of the sanctioning process and a concern for the more efficacious functioning of law in social process. In particular, there is a need for a shared supervision of man's behavior in war with actual impact upon human perspectives and conduct. It is a need which is closely related to the ability of men to guard against their own excesses, and it stems from a realization that new rules, prancing diplomacy, and episodic judgment cannot protect us from ourselves—that responsibility remains our own and requires, at a minimum, a broader sanctioning approach. However, perhaps unlike Freud, it is believed that such a protection is within our grasp if we only choose to reach out.<sup>5</sup> And this new protection is actually less idealistic (therefore, more contextually realistic) than an exaggerated reliance on rules themselves (or even the leader-saviours), for it is based upon man himself.

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the area of human rights. See, e.g., J. Carey, UN Protection of Civil and Political Rights (1970); U.N. Sec. Gen. Report, "Respect for Human Rights in Armed Conflicts," 25 U.N. GAOR, U.N. Doc. A/8052 (1970); McDougal, Lasswell, Chen, "Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry," 63 Am. J. Int'l L. 237 (1969); Schwelb, "Civil and Political Rights: The International Measures of Implementation," 62 Am. J. Int'l L. 827 (1968); and Sohn, "United Nations Machinery for Implementing Human Rights," 62 Am. J. Int'l L. 909 (1968). Perhaps others would feel more comfortable with the concept of law "efficacy," see H. L. A. Hart, *The Concept of Law* 100-101 (1961); or "policy realization," see Moore, "Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell," 54 Va. L. Rev. 662, 666, 669 n.8 and 671-672 ("law is seen as an instrument for effectuating community policies and is good or bad according to its effectiveness in realization of those policies," and the "appraisal function" is to be utilized for a determining of the efficacy of law. See *id.* at 671 and 685, n. 29). See also Lasswell, "Toward Continuing Appraisal of the Impact of Law on Society," 2 Rutgers L. Rev. 645 (1967); and McDougal, Lasswell, Reisman, "The World Constitutive Process of Authoritative Decision," 19 J. of Legal Ed. 253, 258 (1957), stating: "legality must go beyond words to expectations substantially corroborated by deeds," and recognizing that law is actually a conjunction of authority and control in some unspecified degree. It is exactly this sort of conjoining which the author has in mind, or the greater serving of policy, the greater conjoining of goal values and practice in actual context, and the efficacy of expectation.

<sup>5</sup>For evidence of a related optimism, see Reisman, "Private Armies in a Global War System: Prologue to Decision," 14 Va. J. Int'l L. 1, 35 (1973); and McDougal, Lasswell, Reisman, *supra* note 4, at 254-255.

<sup>6</sup>See McDougal, Lasswell, & Reisman, "Theories About International Law: Prologue to a Configurative Jurisprudence," 8 Va. J. Int'l L. 188, 194 (1968).

Moreover, although "one may observe...in all parts of the world an increasing awareness and concern that mankind has not yet created the legal institutions, or processes of authoritative decision, adequate to clarify and secure common interests under conditions of contemporary interdependence,"<sup>6</sup> the very fact of increasing awareness and concern points to the increasing feasibility of cooperative processes for law implementation which are more useful than present mechanisms though far short of a highly centralized world judiciary and police force. Perhaps, it may be added, even an expanded awareness of the types of sanctions available for the securing of efficacious legal policy in social context will significantly add to the feasibility of a cooperative response to needs for improved implementation. Professors McDougal and Feliciano have stated that sanction strategists might, for example, utilize suitable ideological symbols "with a view to affecting the expectations, demands, and identifications of people in the audience, to creating attitudes--that is, stresses or tendencies to the commission of acts by which a particular perspective is externalized--and to channeling and directing the existing tensions as well as the expected response of the audience."<sup>7</sup>

Implicit in this statement is the recognition that law efficacy is dependent upon environmental and predispositional conditions. Thus, if one seeks to make legal policy more effective, the relating of legal policy to perspectives which are actually held (a predispositional condition) and the expansion of shared perspectives so as to more fully interrelate legal policy and alternatives in decision to actual patterns of community perspective can more fully guarantee the actual implementation of legal policy in social context.<sup>8</sup> It is this sort of insight which has led these authors to conclude that those who seek a greater efficacy of law in social interactions should focus not so much on "'permanent' panaceas in either specific institutional structure or technical principle and procedure," as on the need to develop:

a more comprehensive conception of a sanctioning process that will facilitate the continuous employment of all necessary intellectual skills in the invention and evaluation of the detailed strategies rationally designed for securing practicable immediate, mid-range, and long-term goals in continually changing contexts of conditioning factors.<sup>9</sup>

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<sup>7</sup>M. McDougal, F. Feliciano, *Law and Minimum World Public Order* 317 (1961) [hereinafter cited as McDougal & Feliciano].

<sup>8</sup>See McDougal & Feliciano at 278, also referring to the "harnessing" of "their perspectives to the implementation of" legal policy.

<sup>9</sup>McDougal & Feliciano at 278.

With this insight and their challenge in mind, this article will seek to explore several often interrelated sanction possibilities and to relate institutional functions (present and potential) to such possibilities rather than seek to set up an institutional structure and to rationalize a particular systemic "necessity" through an analysis of supportive trends and conditioning factors. Indeed, the purpose of this article is to explore the present systems by which men could guard each other, or the systematized capacities<sup>10</sup> for law implementation, through inquiry into the operative basis of law in social and political context, present sanction needs and system capabilities, general functional possibilities, and an integrated analysis of certain trends and system developments. This inquiry will hopefully provide an opportunity for a cooperative breakthrough in law of war effectiveness through a community adoption of a new international process for shared supervision, participation, and authoritative response. A more effective system for implementing the law of war could substantially contribute to general world order as well, since the adoption of effective legal policy which seeks to attenuate the effects of violence in war could directly aid in bringing about a conclusion of hostilities where they do exist. At the very least, such an effort will aid through a limiting of the degree and effect of armed violence and, thus, will confine and manage world disorder where it does occur and provide a basis for further normative effectiveness through cooperative effort.

#### Community Expectations: An Operative Base

One of the first law effectiveness considerations concerns inquiry into the nature of international law and its operative base in the human context.<sup>11</sup> Legal policy and normative principles must have a basis in reality and in expectations shared by a significant number of persons in

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<sup>10</sup> By "systematized capacities," the author means the capabilities of the formal systems or constituted authoritative processes by which law can be implemented into actual human conduct (e.g., the United Nations system). Useful questions in this regard are: what kinds of systems do we have for implementing law, who are the potential participants, in what arenas of social interaction, with what objectives and base values, with what competence or capacities for functioning, and so forth.

<sup>11</sup> As Professors McDougal and Lasswell have reminded, what an inquirer "regards as law and how he locates it in its larger community context" is significant since it will "determine how he conceives every detailed part of his study: his framing of problems, his choice of tools and procedures, and his recommendation of alternatives;" Lasswell & McDougal, "Criteria For A Theory About Law," 44 S. Cal. L. Rev. 362, 376 (1971).

a given community (their legal expectations, in particular),<sup>12</sup> or there is likely to be little regard for law in actual practice. Hall had early warned:

It would be very unwise of an international lawyer to indulge in the delusion, with which he is often credited, that formulas are stronger than passions.<sup>13</sup>

Of course, this warning does not preclude the use of a formula which itself is based upon identifiable community "passions" for law and justice and which reflects shared expectations of the members of the social group; nor does it require a disillusionment with the law and the attribution of an exaggerated role to naked power.<sup>14</sup> Heeding such a warning, in fact, seems to require that legal formulas be based on expectations and that some consideration of other types of perspective be included in realistic and policy-serving decision.<sup>15</sup> The problem for the international scholar

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<sup>12</sup> By "legal expectations," the author means the legal expectancies of persons or the expectancies of an existence of legal policies, "rights", and "duties" (expectations in the broadest sense are assumptions about events or outcomes). "Community expectations" are those shared by most all of the participants in the ongoing international legal process. Expectations are not to be confused with the demands for value outcome by participants in a particular controversy or identifications with persons or groups (which are the other major components of perspective). See McDougal & Feliciano, at 285. See also Reisman, *supra* note 5, at 46, for use of a concept of shared expectancy of "right" in connection with the role of authority ("expectations of what is substantively and procedurally right").

<sup>13</sup> Hall, *International Law*, preface (3rd ed. 1890).

<sup>14</sup> See McDougal & Feliciano at 3-4 on the role of "authority;" and Lasswell & McDougal, *supra* note 11, at 374.

<sup>15</sup> In fact, decision-makers should realize that the realistic function of rules is not to mechanically dictate specific decision but to guide the attention during a necessary process of choice "to significant variable factors in typical recurring contexts of decision, [and] to serve as summary indices to relevant crystallized community expectations, and, hence, to permit creative and adaptive, instead of arbitrary and irrational, decisions." See McDougal & Feliciano at 57.

(or the disengaged observer of the actual events who is nevertheless deeply committed to the goal values of human dignity), then, lies in the clarification of legal policy, the identification of other relevant expectations and demands, an inquiry into the responsiveness of particular formulas to those expectations,<sup>16</sup> and the devising of sanction strategies and institutional means for the effective fulfillment of shared expectations in actual human conduct.

Law must reflect public expectations (i.e., those which are generally shared by the members of a community) as well as the generally shared demands for value outcomes, but this does not mean that legal decisions are to be purely "political" in nature (with all the evil connotations that are popularly associated with a suspected substitute of "political" for "legal" bases of decision). The term "political" is commonly associated with a form of power (control) and a connotation of decisional deference to naked power as opposed to authoritative norms. The common conception of "politics" is oriented toward the principles of ruling, government and control, or the regulation of social conduct through effective power (control) relations and practices.<sup>17</sup> Popular conceptions of law, on the other hand, are more apt to involve inquiry into all values (power as well as: wealth, well-being, respect, rectitude, skill, enlightenment, and affection),<sup>18</sup> their interrelation in context, and the regulation of social conduct in accordance with legal policy or authoritative norms by means of a "public order" decisional process.<sup>19</sup> Thus, popular conceptions tend to

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<sup>16</sup>For a proper focus on the operative base, one must also consider the interrelationship between expectations, other aspects of the social context, and relevant values. A comprehensive methodology utilizing phase and value analysis can be found in the McDougal-Lasswell approach. See, e.g., Lasswell & McDougal, supra note 11, and references cited.

<sup>17</sup>See H. Lasswell & A. Kaplan, *Power and Society* 75 and 117 (1950), [hereinafter cited as Lasswell & Kaplan] concerning "politics," political doctrine, and the political process.

<sup>18</sup>See, however, id. at xvii, stating that a comprehensive inquiry into the political process must begin with the recognition that the power process is "not a distinct and separable part of the social process, but only the political aspect of an interactive whole...the social process in its entirety."

<sup>19</sup>"Public order" includes the more comprehensive preferred patterns for the distribution of values and a preferred pattern of basic institutions backed by sanction. See Lasswell & McDougal, supra note 11, at 375.

separate "political" (control) functions and "law" (authority) and, thus, also leave aside some important matters of law implementation needs and possibilities. However, there is no escape from the interdependence of the authority and control components of social regulation through absolute distinctions between (and even professional specialty differences between) "legal" and "political" decisions.<sup>20</sup> The legal and political processes affect all values and both involve the uses of authority and control in a process of public order. Moreover, a comprehensive consideration of varied perspectives within a given community (to include Hall's "passions" and expectations about "political" and "legal" decision) is not at all a subversion of "law" and a deference to one kind of perspective (i.e., to "passions" or "politics").<sup>21</sup> Instead, it involves an inclusion of the varied types of perspective for a more comprehensive consideration of this conjoining of patterns of authority and patterns of control which we, more realistically, refer to as law<sup>22</sup> and which we, more realistically, seek to explore in order to achieve some sort of insight into implementary needs and possibilities.

Where the political and legal processes are most obviously conjoined is in the setting up of the institutional framework for authoritative decision in a given community or context. This establishment of an authorized decisional structure has been usefully referred to as the "constitutive process" or the comprehensive process by which fundamental institutions of decision are constituted, maintained, modified,

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<sup>20</sup>In fact, Professor McDougal and others have referred to the quest for a theoretical difference between "political" and "legal" decisions as a vacuous controversy. See McDougal, Lasswell & Reisman, *Theories About International Law*, supra note 6, at 204. However, it does not always appear to be useless to consider major categories of expectation in terms of legal or political expectancy.

<sup>21</sup>Others have falsely accused Professor McDougal et al of deferring to political perspective over legal policy. Compare Gottlieb, "The Conceptual World of the Yale School of International Law," 21 *World Politics* 108 (1968); and Young, "International Law and Social Science: The Contributions of Myres S. McDougal," 66 *Am. J. Int'l L.* 60 (1972) with McDougal, "International Law and Social Science: A Mild Plea in Avoidance," 66 *Am. J. Int'l L.* 77 (1972).

<sup>22</sup>On the conception of law as a mergeance of "authority" and "control" or as authoritative decision, see, e.g., Lasswell & McDougal, supra note 11, at 384.



or terminated.<sup>23</sup> And since it is not possible absolutely to separate "political" from "legal" process, it has been suggested that a more fruitful inquiry should proceed by distinguishing between "constitutive" decisions and "public order" decisions rather than "political" and "legal" decisions.<sup>24</sup> The point is that by focusing on shared expectations about authoritative decisional structures and norms we have moved beyond the mere deference to naked power, an undue concern over "natural" behavior (a main concern of the naturalist jurisprudential theory) or emotive qualities such as "passion" (a main concern of the sensualist school of legal "thought"). This focus also brings us far beyond simplistic notions of how international laws and organizations function or defeatist notions that no international organizations or institutionalized sanction possibilities will predictably have any policy-serving impact upon human perspectives and conduct, since we are forced by this focus to consider both patterns of authority and control.

Further inquiry into the concept of authority should also help us to articulate what role expectations might play as an operative base for law effectiveness.<sup>25</sup> The concept of authority adopted here has as its empirical referent the shared "perspectives of living community members--their demands for values, their identifications with others, and their

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<sup>23</sup> See McDougal, Lasswell & Reisman, *supra* note 6, at 203; McDougal, Lasswell & Reisman, *supra* note 4, at 257, stating: "The constitutive process is authoritative power exercised to provide an institutional framework for decision and to allocate indispensable functions...;" and Lasswell & McDougal, *supra* note 11, at 386, stating that the constitutive process refers to decisions which "identify and characterize the different authoritative decision-makers, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for making the different kinds of decisions, and secure the continuous performance of all the different kinds of decision functions...necessary to making and administering general community policy."

<sup>24</sup> See, McDougal, Lasswell & Reisman, *supra* note 6, at 204. Of course, this distinction includes inquiry into patterns of authority and control--naked power decisions are, thus, further distinguished.

<sup>25</sup> Recognizing that there are many interrelated contextual variables which condition the effectiveness of norms and institutions whether our standpoint is mainly one of a legal, political, economic, sociological, etc., nature.

expectations about the requirements of decision for securing their demanded values..."<sup>26</sup> Here it might also be useful to distinguish between two types of authority so as not to lose sight of the primary referent to authority which lies in the perspectives of the entire community, although it is recognized that authority is actually itself a dynamic product of an interactive process. Primary authority might refer to both the living community and to the aggregate of community perceptions with an emphasis upon generally shared expectations rather than on the relatively more exclusive oriented aggregate of demands for values by particular persons or the necessarily more exclusive perspectives of some elite that has been allocated a certain measure of decisional competence by the members of that community. Neither the elite nor the elite perspectives can be simplistically equated with primary authority, since the elite never compromises the whole of the social group and it is the whole which is ultimately the primary referent.<sup>27</sup> Relevant community expectations, for our purposes, would be those common to nearly all of the members of the human community (i.e., the "generally shared" expectations); and the main focus on primary authority should concern those which also contain an authoritative base in the shared expectation of legality or a common expectancy of either general legal policy or actual decisional outcome (popularly conceived of as an existence of "rights" and "duties") as opposed to mere aspirations as to what the law should be.<sup>28</sup> No doubt common human aspira-

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<sup>26</sup> See Lasswell & McDougal, supra note 11, at 374; and McDougal, Lasswell & Reisman, supra note 6, at 202-203; stating: "Authority will be sought, not in some mysterious or transempirical source of 'obligation' or 'validity,' but rather, empirically, in the perspectives, the genuine expectations, of the people who constitute a given community about the requirements for lawful decision in that community."

<sup>27</sup> See McDougal, Lasswell & Reisman, supra note 4, at 256, stating: "In the optimum public order which we recommend, the expectations of all individuals equally comprise authority;" although in a given polity those of an effective elite "may be the dominant element of authority."

<sup>28</sup> See 1 Lauterpacht, Oppenheim's International Law 8-9 (8 ed. 1955) [hereinafter cited as 1 Oppenheim], for the view that conscience and morality (which sometimes reflect aspirations as to what the law should be more than expectations) lack the authoritative base of legal expectation and that the power to make a law (authoritative norms) lies in "the common consent [or shared expectation] of the community." Power to make the law here referring to competence (a type of allocated authority which the present author refers to as representative authority). See also Reisman, supra note 5, re: expectations of "right".

tions can become expectations and, thus, the basis for authoritative implementation as human rights, but there are differences between the three which one should keep in mind in order to avoid an intellectual confusion concerning the nature of law and legal rights.<sup>29</sup> Expectations are, it should be emphasized, the primary operative basis of law<sup>30</sup> and, thus, the

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<sup>29</sup>Note that aspirations are usually something less than legal expectancies, and legal expectancies of the existence of "rights" are something less than an existence of rights in fact (the latter being the confluence of authority and control). Some McDougallians might place all these terms under the category "perception-expectation" and, then, differentiate on the basis of intensity, see Moore, *supra* note 4, at 666, and Lasswell, *A Pre-View of Policy Sciences* 25 (1971). But some distinction should be made between perceptions which are expectations (or those more intensely held and "obligation" oriented) and those of a lesser quality. It should be noted also that legal expectations are not always co-existent with the existence of "rights" in fact. See McDougal, Lasswell & Reisman, *supra* note 4, at 258 (aspirations are not the equivalent of "expectations that are substantially corroborated by deeds"). Indeed, as Justice Holmes had early observed, when we speak of a legal "right" or "duty" we are really speaking of "predictions" (or legal expectancies in connection with presumed decision outcomes) "that if a man does or omits certain things he will be made to suffer this or that way by judgment of the court..." See Holmes, "The Path of the Law," 10 Harv. L. Rev. 457, 458 (1897). Note also that Holmes tried to separate morals from law, *id.* at 459-462. Morals and law both relate to "right" behavior but, Holmes felt, morals are more attuned to individual ethical standards (rectitude values) and law to shared legal expectations--but they do interrelate. Even Holmes spoke of law as the "witness" of our moral life or a shared morality. See also 1 Oppenheim at 8, defining morality as something applying to "conscience" alone and not being "enforced" by external power (but this, perhaps, ignores the enforceability of a shared morality in a social process as in the case of traditional Chinese Fa and Li). Professor Lasswell places morality in a category of rectitude; see Lasswell & Kaplan at 72, 82, and 87.

<sup>30</sup>See McDougal, Lasswell & Vlasic, *Law and Public Order in Space* 146 (1963).

key to authority. Even this main focus could be somewhat misleading, however, since a most comprehensive consideration of authority would include all patterns of authority or all aspects of perspective about the requirements of decision, and they are interrelated (i.e., the competence requirements such as who, where, when, and how, and even decisional outcome--the what or the "by what criteria").<sup>31</sup> The complete "process of authoritative decision by which a community shapes and shares its values" actually includes two major patterns of authority: "first, the decisions which establish and maintain the most comprehensive process of authoritative decision and, secondly, the flow of particular decisions."<sup>32</sup> What we have been concerned with so far has involved both but with a primary emphasis upon those perspectives which flow from the entire group. We also note that authority is not a static condition, nor is it ever totally transferred to some elite. This is just one of the reasons why "the people" are the key to effective law, and a sanctioning process which ignores this fact is myopically bound to failure (prancing diplomatic elites to the contrary).

The second main aspect or type of authority might be referred to as representative authority. This would involve authority or competence which is conditionally transferred to a group of decision-makers by the political formula (referred to as the authoritative decision-makers established by the constitutive process—who actually encompass only an elite of the whole community).<sup>33</sup> This second form of authority is constituted authority (not primary or "natural"); and it is the other main aspect of the comprehensive process of authority or authoritative decision--the elite and the institutional framework for authoritative deci-

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<sup>31</sup>See Lasswell & McDougal, supra note 11, at 384-385, stating: "By authority we mean participation in decision in accordance with community perspectives about who is to make what decisions and by what criteria; the reference is...to a certain frequency in the perspectives of the people who constitute a given community."

<sup>32</sup>See id., at 385.

<sup>33</sup>Representative authority seems to be what Professors Lasswell and Kaplan refer to as "authority". See Lasswell & Kaplan, at 133-136. There are also differences between "formal" and "effective" authority. The authority most often considered here is the "formal" authority (both primary and representative). See Lasswell & McDougal, supra note 11, at 384, stating: "By authority we mean participation in decision in accordance with community perspectives about who is to make what decisions and by what criteria..." and that the appropriate criteria for decision relate to "the scope, range, and domain of the values authorized to be affected

sion. It seems preferable to refer to it as representative as opposed to constituted, however, so as not to chance any loss of the fact that ultimate authority rests within the entire group of people and that their perspectives are most relevant in considerations of legal efficacy since it is they who will make the law more effective and critical in the ultimate conjoining of all patterns of authority and control.<sup>34</sup> It can be said that decisions which are made in constituted decisional arenas (the institutional frameworks) by the proper procedures and policies for decision are "authoritative,"<sup>35</sup> even though only temporarily as where it is later evident that the specific decision does not coincide with generally shared expectations about the propriety of the specific decision outcome and it might soon be disregarded in practice. In this case, the term "authoritative" would merely refer to a propriety of institutional process in that decisions are made by authoritative decision-makers in an appropriate manner although the entire "authoritative" and "appropriate" process of deci-

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and to the detailed shapings and sharings of values regarded as appropriate for particular contexts." Others have referred to this state of conferred decisional competence (representative authority) as "legitimacy." See Janos, "Authority and Violence: The Political Framework of Internal War," *Internal War* 130, 132 (H. Eckstein, ed., 1964).

<sup>34</sup> See Lasswell & Kaplan at 75. Note that in an optimum public order "the expectations of all individuals equally comprise authority," and an "instrumental goal of a public order of human dignity is, of course, the equipping of all individuals for full participation in authoritative decision;" McDougal, Lasswell & Reisman, supra note 6, at 256.

<sup>35</sup> See Lasswell, supra note 29, at 28; and Lasswell & McDougal, supra note 11, at 384. However, Professor McDougal has captured the preferable focus by noting that the "outcomes" (decisions, rules in words) of the prescribing function are merely "more particular assertions which purport to be consistent with the (political) formula (and which, if inconsistent, enter into the final assessment of the claims of any pretended formula)." McDougal, "The Structure of Decision in a Free Society," *Law, Science, and Policy*, work papers, Chpt. 1, at 8 (Yale Law School, 1954).

sion (involving popular acceptance of the specific decision "outcome") had not yet occurred, and the term could not relate to particularized consent in connection with the outcome of the institutional process. As Professor Lasswell has written: "To be authoritative is to be identified as the official or agency competent to act; to be controlling is to be able to shape results,"<sup>36</sup> and law is the flow of authoritative decision which combines elements of both authority and control.<sup>37</sup> Here, however, the author would rather retain the emphasis on different levels or aspects of authority so as not in any way to promote a dangerous popular assumption (shared by legal positivists and certain Orwellian "behaviorists") that authority is totally merged in a decisional elite and that the function of sanction strategists is to devise means for the "control" of the rest of the population.<sup>38</sup>

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<sup>36</sup>Lasswell, supra note 29, at 99 (emphasis added). See also Lasswell & Kaplan at 133-135 (1950). If anything, the statement might be reversed so that the word authoritative is associated with a basis in generally shared perspective whereas to be "controlling" is to have patterns of authority actually function within the decisional body or with the actor-decision-maker who is engaged in permissible conduct.

<sup>37</sup>See id.; Lasswell & McDougal, supra note 11, at 384; and McDougal, Lasswell & Reisman, supra note 14, at 200.

<sup>38</sup>This is the type of approach to law adopted by totalitarian regimes; and the 19th Century positivistic and elitist influence on Marx and Engels still seems to pervade, for example, the Soviet concept of law as "rules" emanating from the ruling class (i.e., the "lawmaker" elite). See U.S.S.R., Contemporary International Law 32-33, 164, 167 (G. Tunkin, ed., 1969). See also H. Arendt, Totalitarianism (Pt. III, 1968); and H. Marcuse, Soviet Marxism--A Critical Analysis (1961). For an example of behaviorist adoption of these false, positivistic notions of authority, behaviorist concerns with control, and the use of otherwise alarming and important data on human behavior, see S. Milgram, Obedience to Authority (1973). Thus, many of the positivists, the totalitarians, and the confused or supportive behaviorists demonstrate a concentric conceptual ineptitude which each refers to as "authority" (and which we certainly reject here). For an exposition of related dangers and of the utility of distinction between primary and representative authority, see also Paust, "Human Rights and the Ninth Amendment: A New Form of Guarantee," 60 Cornell L. Rev. (Jan. 1975); and Paust, The Concept of Norm: A Consideration of the Jurisprudential Views of Hart, Kelsen, and McDougal. See also McDougal, supra note 35.

At what point "authoritative" decision changes from "law" to hollow decision ("naked power" or something less) due to unacceptability of the decision "outcome" by the community is not the purpose of this inquiry.<sup>39</sup> What is relevant to note here, however, is the fact that the broader group expectations operating within an interacting process of patterns of authority and control are a key factor and can be crystalized into legal norms to govern conduct even in the absence of "formal" legislative acts of implementation where the consensus as to the existence of the norm is fairly complete.<sup>40</sup> And in the same way the specific legislative acts of the past can be expanded upon by the norm creating process of community expectation.<sup>41</sup> This expansion and change can be found in general or localized practice designed to be in conformity with the developing principles of international law,<sup>42</sup> though all practice is not norm creating or norm changing.<sup>43</sup> The existence of legal rules in the absence of codal precision has

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<sup>39</sup>The reader may wish to compare Lasswell & McDougal, supra note 11, at 385 with id. at 384, and Lasswell & Kaplan at 75.

<sup>40</sup>See, e.g., 1 Oppenheim at 15-19. Thus, we speak of customary international law, general principles of law, and the usages of civilized nations (which evidence such legal expectations--indicia of legal policy and other expectancy). There is even some current Soviet acceptance of much of this insight and, somewhat surprisingly, an identified trend in Soviet thinking which leaves some room for the recognition of shared expectations as an operative basis of law. See U.S.S.R., supra note 38, at 165, 168, 174-178, 184-185.

<sup>41</sup>See Judgment of the International Military Tribunal, Nuremberg, Germany, at 128 (1946), stating: "This law is not static, but by continual adaptation follows the needs of a changing world" [hereinafter cited as IMT]. See also 1 Oppenheim at 8, stating: "so the law can grow without being expressly laid down and set by a law-giving authority;" and Advisory Opinion on the Legal Consequences For States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1960), [1971] I.C.J. 13 (June 21, 1971); and Lachs, The International Law of Outer Space, 113 *Recueil des Cours* 95 (1964).

<sup>42</sup>See 1 Oppenheim, at 26, distinguishing between custom, which is associated with the expectation of legality over a long time period, and political usage, which does not itself have such an expectancy base.

<sup>43</sup>See Farer, C.E.I.P., The Laws of War 25 Years After Nuremberg, at 12 (May 1971), stating that the "operational substance of norms is de-

been consistently recognized by the courts<sup>44</sup> and text writers;<sup>45</sup> indeed, it has been recognized by international "legislators" themselves.<sup>46</sup> For example, one of the codal provisions of the law of war, the Hague Convention No. IV (1907),<sup>47</sup> provides in the preamble that it was not possible to create regulations covering all the circumstances which might arise in practice, but:

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rived from the behavior and attitudes of the entities whose relations they stabilize... It is the old conundrum of whether behavior should be interpreted as deviant or creative, precedent-shattering or precedent-establishing. This is an inveterate problem of any legal system, but one particularly onerous for a system lacking centralized and specialized institutions for systematic clarification and revision of the 'law'." See also T. Taylor, *Nuremberg and Vietnam: An American Tragedy* 29 (1970) [hereinafter cited as Taylor]. The practice, however, should be in conformity with shared legal expectations to be norm creating. See Lasswell & McDougal, *supra* note 5, at 384, stating: "When decisions are controlling but not authoritative, they are not law but naked power."

<sup>44</sup>See, e.g., DMT at 248; and *United States v. List et al.*, 11 Trials of War Criminals 757, 1248 (1948) [hereinafter referred to as T.W.C. and *United States v. List*].

<sup>45</sup>See, e.g., 1 Oppenheim at 7.

<sup>46</sup>The term "legislators" is used here in a general sense. The author recognizes the lack of an international "legislature" as such, but disagrees with any view that legislation in the general sense is lacking. The law of war has a partial "source" in treaties, though pushing semantic differences any further here would not be useful. Compare I.C.J. Stat. Art. 38, para. I, 1 Oppenheim at 27-29; and U.S. Dept. of Army, *Law of Land Warfare*, para. 4 (Field Manual 27-10 1956) [hereinafter cited as FM 27-10] with Taylor at 29.

<sup>47</sup>Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter referred to as H.C. IV]. This convention has since grown to the status of being customary international law (as recognized at Nuremberg) and some of the actual text has been expanded or generalized into broad principles of law. See FM 27-10, para. 6.



On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.<sup>48</sup>

Similarly, the 1949 Geneva Conventions contain an expression which recognizes the existence of normative precepts which are not as readily identifiable as those of the Conventions but which are still of binding validity. The Conventions state that the parties to the armed conflict "shall remain bound to fulfil" obligations created "by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."<sup>49</sup> And in The Paquete Habana, the United States Supreme Court made the relevant and often quoted statement that:

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<sup>48</sup>H. C. IV, preamble (this is known as the Martens clause and was named after the Russian jurist, Fedor Martens).

<sup>49</sup>See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 158 (1956), 6 U.S.T. 3516, T.I.A.S. No. 3365; 75 U.N.T.S. 287 [hereinafter referred to as the 1949 Geneva Civilian Convention]. These conventions have not been declared to be customary international law and binding on nonsignatories (except so far as common article 3 provides), yet the fact that almost every nation in the world has signed them is of some importance (perhaps of more importance to the minority of scholars who believe that obligations only arise from the express consent of a nation). These are, perhaps, the most widely ratified treaties in existence outside of the United Nations Charter itself.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who, by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>50</sup>

Recognizing the need for evidence of what the law really is (especially when law might be imperfectly expressed, not expressly cover all situations, or might have changed), we might seriously consider the need for a system of law implementation which will approximate uniformity and continuous up-to-date expression of community expectations and demands in the area of the law of armed conflict.

Professors McDougal and Lasswell and their associates have viewed international law as a type of "value-oriented jurisprudence," which has "the distinctive orientation" in "the jurisprudence of human dignity." Because of mutual affectation and other common interests, the syndrome of parochialism is not the focus, but rather:

[t]he value goal is universal in scope, and evaluates the institutions of any time and place according to the criterion of general, not narrow, participation in the shaping and sharing of the values yielded by man's life in society. Within the reference frame provided by this objective it is incumbent upon the scholar or the decision-maker to locate himself in the moving context of past, present, and future events . . . [so as to] foster the eventual emergence of a public order of free men.<sup>51</sup>

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<sup>50</sup>The Paquete Habana, 175 U.S. 677, 700 (1900); see also I.C.J. Stat. art. 38, para. 1. For a similar British practice, see *Triquet v. Bath*, 3 Burr, 1478, 96 Eng. Rep. 273 (K.B. 1764) before Lord Mansfield on the Kings Bench.

<sup>51</sup>McDougal & Feliciano, Introduction by Professor Lasswell, at xix-xx, and xxi.

Many agree that the value goal must be universal, that the decision-maker and actor must consider and conform to the universal policy or goal values, and that application of the law of war must be devoid of special interest dominance or mutilation. But how is one able to identify changing expectations, to choose from competing claims in conformity with expectations which are generally shared, to receive authoritative community guidance or suggestion relevant to conduct, to seek conforming response from other parties to the conflict, and to guard against one's own excesses? How can human goal values be implemented and effectively supervised in a system where each state is left to interpret and apply the international norms on its own?

### Encumbering State Sovereignty

The international "system" for norm implementation that we presently have is one in which the state itself predominates. It is often that human values have been compromised or flatly rejected through deplorable self-protective practices of "sovereign" state elites, and, at that, through an often myopic view of national or elite self-interests. This is not likely to change overnight, and the situation has been described as being quite predictable when law implementation is left primarily to the discretion of each state (and, thus, to the state officials) absent any international system for greater community expression and guidance. As Mr. William Korey has remarked:

The responsibility of government officials, after all, is first and foremost the protection and promotion of their own state's national interest. The promotion and protection of the rights of citizens of other countries have little relevance to this aim. Moreover, many officials consider human rights to be a dangerous Pandora's box. If it were opened, no government would be safe from attack. Thus it is the better part of valor to keep the lid closed lest one's own shortcomings be exposed, marring the image a government is attempting to project.<sup>52</sup>

No government, it seems, wants to be the implementor (invoker) if its own activities are also subject to condemnation or if it seeks some advantage

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<sup>52</sup> Korey, C.E.I.P., The Key to Human Rights--Implementation 66 (Nov. 1968).

from the offending government. Few governmental elites have even attempted to regulate themselves or to prosecute violators of the law of war within their jurisdiction. The result has often been that state elites are reluctant to condemn or to guard each other against future excesses, and the individual is left without protection or even a voice in matters which affect him directly--matters which the law is designed to cover in his interest.<sup>53</sup> Indeed, the Geneva norms have been considered to be peremptory or "absolute obligations" which are owing to all mankind rather than towards particular state parties, and yet there is no real effort at a broader inclusivity in implementation.<sup>54</sup>

The intervening and encumbering state "sovereignty" in this area of human concern has resulted in the lack of effective law implementing machinery for normative promotion, prescription, and supervision; and it has further resulted in continuing patterns of value frustration with only intermittent, ad hoc community response. So intermittent apparently that some who seem unaware of the pervading manifestations of community expectation concerning the limits of human suffering and the fundamental rights of man have even denied the existence of law when law was not enforced in all cases by state elites.<sup>55</sup> This alone points to the need for

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<sup>53</sup>Korey, C.E.I.P., supra note 52, at 66-67. See also id. at 68-69, concerning the practice of states in this area (esp. the Greek and Haiti events). States are reluctant to condemn on such general matters without an organizational framework for proper inquiry. Perhaps they will continue to react in a similar manner in an organization to implement the 1949 Geneva Conventions, but it seems that some inquiry is more likely when an organizational framework is provided for a consensus and the state-sovereign votes on the matter can somewhat hide inside a majority vote.

<sup>54</sup>See, e.g., U.N. S.G. Report, Respect for Human Rights in Armed Conflicts, 24 U.N. GAOR, U.N. Doc. A/7720 (20 Nov. 1969), at 31 (agenda item 61), citing U.N. Report on the Law of Treaties, 11 Ybk of Int'l L. Comm. 54 (1957). See also, U.N. Charter, arts. 55(c) and 56, and common article 1 of the 1949 Geneva Conventions.

<sup>55</sup>One such author seems to be the 18th Century Van Bynkershoek, A Treatise On the Law of War (Du Ponceau, trans. 1810) stating, at 2-3, that every force is lawful in war including the death of defenceless people except perfidy, and that "generosity is altogether a voluntary act." This voice seems revived in the pre-WWII German Lawbook on Landwarfare: "By steeping himself in military history the officer will be able to guard himself against excessive humanitarian notions," cited at Colby, War Crimes, supra note 1, at 509. One would agree with the positivist oriented Van Bynkershoek that law must reflect reality, but it seems to the present author that reality includes the identifiable human pronouncements and beliefs which must be analyzed along with practice to decide if

new international machinery in the area of human rights in time of armed conflict for the coordination of sanction strategy, but we will also focus on the present systems which could be utilized for Geneva Convention implementation and, then, seek to identify some of the present system shortcomings or the system barriers to effective law implementing machinery. We should keep in mind that the goals are primarily to identify community goal values (legal policy), to implement these values into practice, to provide guidance and protection, and to supervise action.<sup>56</sup>

### The Present System for Law Effectiveness

#### 1. Under the Geneva Conventions: States, Protecting Powers, and the IRC

Today the "system" outlined in the 1949 Geneva Conventions for law development, implementation, and supervision is an inadequate combination of state obligations and protecting power functions which represented, perhaps, the maximum consensus possible in 1949 but which seems out of line with present expectation and a cooperative consensus which the author believes to be presently possible.

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there were legal expectations which were admittedly not always fulfilled. Furthermore, we should not ever conclude in a simplistic way that the extent of law is to be measured in the extent of "enforcement" when it is recognized that law does exist. Public expectations can today have as much or more of an effect on the positive oriented decision-maker as past political practice, and law is multifarious in nature. It should be noted that state duties to enforce the law were early recognized. See 2 Grotius, *De Jure Belli Ac Pacis* 253 (C.E.I.P. ed., Kelsey trans. 1925); E. de Vattel, *Le Droit des Gens, Ou Principes de la Loi Naturelle* 163 (C.E.I.P. ed., Fenwick trans. 1916); Q. Wright, "The Law of the Nuremberg Trial," 41 *Am. J. Int'l L.* 38, 59, n. 74 (1947), stating: "If an interest is 'protected by international law' every state is obligated by international law not to authorize, and to take due diligence within its jurisdiction to prevent, acts which would violate that interest."

<sup>56</sup>Primary goals preferred here are: (a) the establishment of common responsibility adequate enough to secure minimum order and to mitigate the destruction of values, and (b) the establishment of common responsibility for the creative fostering of an optimum order of human dignity. See also McDougal & Feliciano at vii, ix and 95-96; and McDougal, Lasswell & Chen, "Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry," 63 *Am. J. Int'l L.* 237, 264-269 (1969).

State sovereignty was the backbone and inhibitor of any sort of achievement which was possible in 1907 with the development of the present Hague Conventions on the law of warfare; and in 1949 this was changed only slightly. Some efforts were made to "guarantee" enforcement of the Geneva law through agreed procedure and state (party) duties, and it cannot be doubted that these efforts represented an important breakthrough. Of the many duties relevant to law effectiveness found today in the Geneva Conventions, the most significant are the obligations:

- (1) to enact domestic legislation for the punishment of grave breaches of the Conventions,<sup>57</sup>
- (2) to disseminate the texts of the Conventions and to educate troops and other citizens concerning the principles of the Conventions,<sup>58</sup>
- (3) to communicate with other parties concerning translations and laws or regulations adopted for implementation of the Conventions,<sup>59</sup>
- (4) to "ensure respect" for the Conventions "in all circumstances,"<sup>60</sup>

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<sup>57</sup> See, e.g., G.C., art. 146 (the punitive or corrective sanction objective). See also Paust, "Legal Aspects of the My Lai Incident: A Response to Professor Rubin," 50 Ore L. Rev. 138, 149-152 (1971), reprinted in 3 The Vietnam War and the International Law 359 (R. Falk, ed., 1972); and Paust, "After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts," 50 Tex. L. Rev. 6 (1971), reprinted in 4 The Vietnam War and International Law (1974). A related extensive consideration of this and other prosecution requirements plus an extensive documentation of U.N. trends in decision on this matter is in J. Paust & A. Blaustein, War Crimes Jurisdiction and Due Process: A Case Study of Bangladesh (1974).

<sup>58</sup> See, e.g., G. C., art. 144 (the educational requirement--intelligence function); and 4 J. Pictet, Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 580-582 (1958) [hereinafter cited as 4 Pictet].

<sup>59</sup> See, e.g., Geneva Civilian Convention, article 145 (the communicative, interpretative, and other functions); and 4 Pictet at 582-583.

<sup>60</sup> See, e.g., Geneva Civilian Convention article 1 (the cooperative, implementary, supervisory, and other functions); and 4 Pictet at 15-17. This is the backbone of the implementary obligation and it is interconnected with U.N. Charter, Arts. 55(c) and 56.

(5) to institute an inquiry into alleged violations when so requested and in a manner agreed upon,<sup>61</sup>

(6) to repress any violation of the Conventions,<sup>62</sup>

(7) to search for, arrest, and extradite or prosecute all persons who have committed or ordered grave breaches of the Conventions,<sup>63</sup>

(8) to grant the ICRC (International Committee of the Red Cross) certain visitation and investigatory privileges,<sup>64</sup>

(9) to request or accept the services of a humanitarian organization under certain circumstances,<sup>65</sup>

(10) to allow a properly created Protecting Power or an alternative entity to carry out its functions.<sup>66</sup>

A more detailed consideration of the Protecting Power system reveals a complexity of conditions that are imposed by the consenting "sovereigns" which has led to the ineffectiveness of that particular system. In fact, the system, as envisioned under the Conventions, has never been utilized

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<sup>61</sup>See, e.g., Geneva Civilian Convention, article 149 (the investigative function); and 4 Pictet at 603-606. Note that the enquiry procedure could take form in a state, protecting power, commission, or court, etc., depending on the consent of the parties.

<sup>62</sup>See, e.g., Geneva Civilian Convention, articles 146 and 149 (the punitive, control, supervisory, and other functions); and 4 Pictet at 593-594 and 606.

<sup>63</sup>See, e.g., Geneva Civilian Convention, article 146 (the punitive and other functions); and 4 Pictet at 590-593.

<sup>64</sup>See, e.g., Geneva Civilian Convention, article 143 (the visitation, investigative, supervisory, humanitarian, and other functions); and 4 Pictet at 579 (express agreement for ICRC visits). See also Geneva Civilian Convention, article 3 (ICRC may offer services in a conflict not of an international character), and articles 10 and 11 (possible roles of the ICRC in the Protecting Power, alternative, or humanitarian system capacities).

<sup>65</sup>See, e.g., Geneva Civilian Convention, article 11 (the humanitarian function); and 4 Pictet at 99-113.

<sup>66</sup>See, e.g., G.C., arts. 9-12 and 143 (the protection and other functions); and 4 Pictet at 93-112.

in its twenty four years of formal existence.<sup>67</sup> The backbone of multi-lateral supervision was to be contained in a Protecting Power that would operate as an agent of a party to the conflict and as a somewhat impartial agent of the other parties to the Conventions through a maze of duties, conditions, and consensual arrangements.<sup>68</sup> Once the Protecting Power comes into being, the parties have a duty to "cooperate" with it and to facilitate its tasks,<sup>69</sup> which include the duty to scrutinize the Conventions.<sup>70</sup> The Protecting Power may also help by offering its "good offices" for dispute settlement, and parties to the conflict are bound to give effect to such an offer.<sup>71</sup> Pictet calls this last aspect the "conciliation procedure" (recommendation) and he states that, in such circumstances, the Protecting Power will try to achieve a "fair compromise reconciling the different points of view" and, in a sense, act as an agent of all of the parties to the Convention.<sup>72</sup>

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<sup>67</sup> See U.N. S.G. Report A/7720, supra note 54, at 66. The ICRC has had to perform as much of the contemplated role as it could and has been performing humanitarian functions in about half of the conflicts that have occurred since WW. II. See ibid.

<sup>68</sup> See ibid. and 4 Pictet at 86-92 (especially at 87 n.1). The 1949 Geneva Conventions expanded a traditional role of neutral states and systematized a practice earlier established, under the same name (Protecting Power).

<sup>69</sup> See, e.g., Geneva Civilian Convention, Article 9.

<sup>70</sup> See supra note 67.

<sup>71</sup> See, e.g., Geneva Civilian Convention, article 12; and 4 Pictet at 113-117.

<sup>72</sup> See 4 Pictet at 113-117. See also Geneva Civilian Convention, article 149 (the inquiry procedure in case of an alleged violation of the Conventions), and note that the Diplomatic Conference adopted a resolution recommending the use of the International Court of Justice when other means fail; 4 Pictet at 117. This was a notable systems change from the inquiry procedure contemplated under the 1899 Hague Conventions whereby a Commission of Inquiry would be established on an ad hoc basis to make factual determinations and report them to the parties for further party negotiation; see Hague Convention for the Peaceful Adjustment of International Differences, July 29, 1899, 32 Stat. 1779, reprinted in 1 Am. J. Int'l L. Supp. 107, 112-113 (1907).



The real difficulty with the Protecting Power system seems to concern the ad hoc procedure for appointment of the entity and the inter-related practical problems of achieving the necessary consent of the parties once an armed conflict occurs. Not only must the Power of Origin (the party whose persons are in the hands of the Detaining Power) consent to ask a neutral power if it will represent it, but the neutral power must itself consent to such an appointment as well as the enemy of the Power of Origin (the Detaining Power).<sup>73</sup> This need for consent from at least three different parties during even a relatively simple type of armed conflict has been rightly criticized as an unworkable procedure by eminent scholars.<sup>74</sup> And without the appointment of a Protecting Power all of the procedures and functional ability connected with that system fail to operate--the result being an inexcusable failure of the operationalizing of community consensus through any mechanism in many cases.

It is true that the selection of a substitutive Protecting Power was contemplated, but such a selection also rests on an ad hoc consensual basis,<sup>75</sup> and it fails to become operative due to sovereign inhibitions. Although the Conventions also provide that a humanitarian organization must be allowed to function in case of a failure to agree on the appointment of a Protecting Power or a substitute, the humanitarian organization is to serve only through "humanitarian functions" and not through those additionally contemplated for the Protecting Power.<sup>76</sup> This alone points to the need for a permanent body created in advance of armed

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<sup>73</sup>See 4 Pictet at 87. This has been referred to as the tripartite consensual basis which is necessary for the desired functioning of a Protecting Power. These terms are from the Convention and are defined in Pictet's Commentary.

<sup>74</sup>See, e.g., paper delivered to the U.S. Army JAG School, Sept. 1971, G.I.A.D. Draper, Collective and Individual Responsibility for the Application of Humanitarian Law in Armed Conflicts (Sept. 3, 1971). Professor Draper has also suggested the creation of an international protecting power within, but "independent" of, the United Nations.

<sup>75</sup>See ibid. and Geneva Civilian Convention, article 11 plus 4 Pictet at 107-108 and 110.

<sup>76</sup>See ibid., plus 4 Pictet at 109-110. Pictet, id. at 109 states: "The Detaining Power must request the intervention of a humanitarian organization. Moreover, should such an organization anticipate the Detaining Power's request by spontaneously offering its services, the Detaining Power must accept them," (or find another humanitarian organi-

violence through an agreement of the parties to the Conventions; and since it cannot be known for sure who will be involved in armed conflicts of the future, perhaps the functional capacities of a Protecting Power should be implemented through either a permanent neutral body or through a body involving all of the parties to the Conventions in some form of constitutive assembly with subordinate working entities.

It should be noted that the ICRC, the humanitarian organization historically most concerned with these Conventions and most likely to be acceptable to the parties to an armed conflict, is unable and unwilling (and should not seek) to jeopardize its ability to act by assuming the greater functions of a Protecting Power.<sup>77</sup> Often, the Red Cross must function in relative silence and make its plea and reports only to deprivor regimes.<sup>78</sup> This, of course, must be remembered in con-

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zation, see *id.*, next paragraph). Note that the ICRC would, in most cases, be the proper organization and that the ICRC enjoys certain visitation prerogatives under Geneva Civilian Convention, article 143, in any event. (For a conflict not of an international nature, see common article 3; the Red Cross "may offer" its services in such a conflict). See also GPW, Art. 126.

<sup>77</sup>See, e.g., 4 Pictet at 102 and 109, stating that the ICRC could not assume all of the responsibilities of a Protecting Power and remain impartial and humanitarian in direction. And see 124 Int'l Rev. of the Red Cross 411-412 (1971) (extracts from the Statutes of the ICRC re: its functions as an independent, impartial, universal, nonpolitical, and neutral organization). But note that the ICRC also assumes a role as an improver and disseminator of law and recognizes a role under the Conventions to seek application of the Conventions and "to take cognizance of any complaints regarding alleged breaches" (*ibid.*). See also Freymond, "The International Committee of the Red Cross Within the International System," 133 Int'l Rev. of the Red Cross 245 (1972) and references cited; Gottlieb, "International Assistance to Civilian Populations in Armed Conflicts," 4 N.Y.U.J. Int'l L & Policy 403, 420-425 (1971) on the functions of the ICR; and the U.N. S.G. Report A/7720, *supra* note 54, at 66.

<sup>78</sup>See Freymond, *supra* note 77, at 249, stating that "the ICRC has had no alternative. It cannot, as it is so often being asked to do, protest publicly lest all doors be closed to it;" and Gottlieb, *supra* note 77, at 420, stating that ICRC activity has hinged upon "silence when silence was the price for doing anything at all." Apparently some participants in the ICRC will push, at times, for a more open effort of protest, as was the case in the October, 1973, Arab-Israeli War. See

sidering the functional interrelationship between a new supervisory organization and the ICRC or in considering the functional capacity of our present "system" for Geneva Convention implementation. This does not preclude an active and valuable ICRC role in the present or future context nor within the framework of a new system. In fact, multiple functional efforts may be desired, but the capacity of the ICRC does indicate that it cannot assume the duties incumbent upon each party to the Conventions to implement and ensure respect for the Conventions in all circumstances.<sup>79</sup> Those state obligations which perhaps entail the duty to guard each other against excesses, especially common Article 1 in conjunction with the U.N. Charter, cannot be pushed onto the ICRC in the hope that the state itself can continue to avoid active involvement in the ongoing regulation of Geneva law and human rights. Moreover, although it is true that the ICRC, itself recognizing certain inadequacies of past ICRC functioning and a greater potential role in humanitarian functioning, has been newly reorganized to allow greater local initiative and even the pressuring of governmental elites through an expression of "the public's dissatisfaction with the conduct of nations" with an occasional appeal to world public opinion,<sup>80</sup> the ICRC cannot be called upon to perform all of the state obligations under the Geneva law and the U.N. Charter, nor to provide the complete framework for a more effective sanctioning process.

There are further difficulties and inadequacies with the present system beyond the problem of consensus in the appointment of a Protecting Power. Grave difficulties arise in getting the parties to an armed conflict to even admit that a conflict exists or to agree on the legal nature of the conflict, the extent of Convention obligations, the types of persons entitled to protection and methods of implementation.<sup>81</sup> Further-

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"Red Cross Happy at Mideast Steps," N. Y. Times, Dec. 3, 1973, at 6:1.

<sup>79</sup> See Gottlieb, *supra* note 77, at 422-426, suggesting that "different types of humanitarian concerns" are proper and necessary where complex political, military, economic, and social realities require a multiplicity of humanitarian effort to gain as complete a coverage as possible. Cf. *id.* at 427. Professor Gottlieb classified at least four main types of humanitarian effort (neutral, revolutionary, moralistic, and international). See also U.N. S.G. Report A/7720, *supra* note 54, at 66-67.

<sup>80</sup> See "Red Cross Happy at Mideast Steps," *supra* note 78. See also "Red Cross Urging Code on Civilians," N.Y.T., Oct. 12, 1973, at 18:3.

<sup>81</sup> See G.I.A.D. Draper, *supra* note 74; H. Levie, When Battle Rages, How Can Law Protect? (J. Carey ed. 1971) (working paper, 14th Hammaraskjold

more, there exist logistical, physical and financial problems which tend to preclude the effectiveness of an ad hoc system and which additionally point to the need for an international organization with defined functional capacities and operational support.<sup>82</sup> Also important is the fact that the Protecting Power "system" is unable to guarantee a universal input of thought or to provide a human rights focus as opposed to that of the sovereign elite system. So tangled are the roles which the Protecting Power is asked to play, that it seems likely that a conflict in values will occur.<sup>83</sup> Further criticism concerns the ad hoc nature of the general system which will necessarily lead to imperfect action and an inability to deal with long range goals and problems in Convention implementation. Professor Draper's generalization, that absent a mechanism for the regular application of the supervisory functions all further law-making (prescription) can have but little effect, is too close to the truth.<sup>84</sup> He adds that unless some effective mechanism for the observance of human expectations is generated, the law itself might

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Forum); 124 Int'l Rev. of the Red Cross 366 (1971); and 4 Pictet at 115.

<sup>82</sup>See 124 Int'l Rev. of the Red Cross 367 (1971) (duties of the Protecting Power are considerable and costly); and 4 Pictet at 87 and 89 (staffing, facility, transport, material, monetary, and other burdens may be extremely heavy for one state to bear). See also Freymond, supra note 77, at 258-259, for an analysis of logistical and other functional problems faced by the ICRC in the past.

<sup>83</sup>See 4 Pictet at 110, stating that the Protecting Power is "primarily the agent of the Power of Origin, whose interests it safeguards," but that the Conventions also impose humanitarian duties and obligations to ensure input of universal values which may well conflict, in part, with state interests.

<sup>84</sup>Draper, paper, supra note 74. Note that Professor Draper states that it is not practical to rely on only one mechanism--there must be available to belligerents a number of different methods with a body such as the ICRC as a mandatory temporal solution in the humanitarian functional area until one of the alternatives is finally agreed upon. Of course, this would allow parties to reject other functional concerns.

someday fall into "total and cynical discredit", at least among the people for whom the rules were created. Certainly the collective responsibility of all parties to the Conventions to respect and ensure respect for the law in all circumstances demands something more. And collective responsibility can best be met, it seems, in a collective system whereby all parties can and do participate. We desperately need a cooperative effort in this area of human concern. The present system is ineffective for human needs and even for the implementing of present state obligations which exist under the Conventions.

## 2. Report of the Secretary General: A View of Transition

A recent report of the U.N. Secretary General contains some valuable comment and insight into functional needs and system capacities.<sup>85</sup> The shortcomings of the Protecting Power system are recognized and it is suggested that a Protecting Power be made to represent the interests of the community as a whole.<sup>86</sup> It is stated that all efforts designed to minimize the unnecessary suffering of human beings should be considered by the community in the development of new sanction strategy, but certain comment which consistently appears in the Report implies that now there is a preference for the creation of some form of international machinery for the application of the Geneva Conventions.<sup>87</sup>

The valuable role that the ICRC has performed in the past, and can continue to perform, is also recognized; and it is emphasized that close cooperation between the Red Cross and the United Nations organs is necessary. But it is known that the ICRC role lies in the exercise of humanitarian functions and that other functions connected with an effective implementation and securing of Geneva law might be exercised by "institutionalizing, through United Nations organs or otherwise, other international efforts, [e]specially in fields in which the International

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<sup>85</sup> Respect for Human Rights in Armed Conflicts, 25 U.N. GAOR, U.N. Doc. A/8052 (1970) (agenda item 47). This was the second report of such a nature; the first report being made in the 24th Session (U.N. Doc. A/7720 [1969], supra note 54.).

<sup>86</sup> Id. at 75. We have already discussed the difficulties and conflicting values connected with this approach.

<sup>87</sup> See id. at 76-79, and 6, 10-11, 19 (special commissions in safety zones), 23-29 (the 1954 Hague Convention for the Protection of Cultural Property has a system of party representation, a Commission-General, and

Committee cannot operate..."<sup>88</sup> The preliminary report had noted the limits placed upon the ICRC which arise not only from such problematic concerns as whether the ICRC statements will find acceptability among states as constituting an authoritative expression, but also from the traditions, purposes, and character of the organization itself.<sup>89</sup> It seemed a general conclusion that the ICRC cannot solve all of the problems of Geneva Convention implementation by itself and that all nation-state signatories will have to coordinate their contributive efforts through some mechanism.

The Secretary General also explored the possible role of the United Nations and concluded, not surprisingly, that due to the nature of the U.N. organization as the "most authentic and comprehensive expression of the international community," a United Nations role would appear eminently justified.<sup>90</sup> We will want to explore the functional capacities of that body before making a similar conclusion--the Secretary General's Report was not self critical. It is recognized, however, that certainly some contribution can be made by the United Nations entities as well as numerous NGOs such as the International League for the Rights of Man, Amnesty International, and so forth.<sup>91</sup>

The Secretary's Report noted the history of past involvement by the United Nations in the area of human rights during armed conflict, but it was admitted that past practice has been of an ad hoc nature and that it would be most desirable to set up an "agency of implementation under the

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other modalities worth exploring, 49-51, and 58.

<sup>88</sup> Id. at 11; see also id. at 49, and 76-79.

<sup>89</sup> Id. at 76. See also Freymond, supra note 77; cf. supra note 80.

<sup>90</sup> Id. at 77. The Report was not self critical. Recent practices confirm this desire for a more active U.N. role. See, e.g., The Rights of Man--Bull. of Int'l League For the Rights of Man 6 (Nov. 1972), stating that the League "joined with other NGOs in submitting a proposal to establish a permanent U.N. body to investigate human rights complaints arising from armed conflict and violations of the laws of war." For an analysis of general human rights implementary capacities of the U.N., see Sohn, "U.N. Machinery for Implementing H.R.," 62 Am. J. Int'l L. 909 (19-68); and McDougal & Bebr, "Human Rights in the United Nations," 58 Am. J. Int'l L. 603 (1964).

<sup>91</sup> See, e.g., International League for the Rights of Man, Immediate Release no. 74-960-1, charge of Syrian refusal to follow GPW (Jan. 4, 1974); and "Private Group Seeks to Protect Political Prisoners in Viet-

aegis of the United Nations."<sup>92</sup> But, curiously, the Report concludes that the organization should have the same attributes as those of the ICRC, (i.e., that it should be strictly humanitarian, scrupulously non-political, and have all the guarantees of impartiality, efficiency, and rectitude); the same unoffending attributes, it should be noted, which now preclude the ICRC from functioning effectively in the certain areas of law implementation and supervision (or from taking over the state signatory obligations).

Perhaps it would be better to have the ICRC maintain its functional role instead of creating a duplicatory entity with the lack of power to become more effective and a lack of functional ability to fulfill the rising hopes which people might attribute to the entity upon its creation (not having dreamed that some sovereign-elite conspiracy might have sought only an unoffending farce). Perhaps, indeed, it would be better to allow the states to express themselves directly for a consensus formation of some worth or, in other words, perhaps we need to create a body which is highly political, involved and able to formulate consensus expressions in an authoritative manner.<sup>93</sup> In fact, how can an organization provide authoritative guidance without being somewhat political when the relevant law must deal with human beings at their moments of greatest stress and conflict? If by impartiality the Secretary General means that the organization should remain inoffensive or neutral, he would be asking the entity to refrain from active implementary involvement (or to cut back on its sanction activity as well as its general intelligence, promotion, invocation, and application functioning). However, if by impartiality

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nam," N. Y. Times, Nov. 3, 1972.

<sup>92</sup>S. G. Report, supra note 85.

<sup>93</sup>For some support of the view that international organizational functioning and legal efficacy are necessarily partially reliant upon "political forces" in context, see I. Claude, *Swords Into Plowshares* (3 ed. 1964). We note that politics is not to be feared but understood if one is interested in viable law or institutions since the legal and political processes are contextually intertwined.

(in the neutral, noninvolvement or inoffensive sense) is fine for some humanitarian functions, but it isn't worth a damn if the purpose is to stop a state or group from moving outside the boundaries of a shared expectation. A demonstrated consensus within an authoritative structure could do much more than unoffending impartiality. Indeed, this seems to have been explicitly recognized by ICRC leaders that seek to provide an even more active ICRC effort to utilize the important sanction of public opinion. Furthermore, an "impartial" legal consensus and "autonomous" guidance functions, as advocated by the U.N. report, could still find room in an international structure which has a modality for political consensus as well as a consensus of "impartial" experts.<sup>94</sup> This "legislative" body and the expert advisory council could be supplemented with other structures for a more useful coordinate sanctioning of Geneva law.

We should recall, however, that complete impartiality (in both senses considered here) is a myth and the quest for it is no panacea to implementary problems. In fact, it is often given as an excuse for involvement or state elite inaction when cooperative activity is not only called for by the United Nations Charter and common Article 1 of the Geneva Conventions but is also needed to assure the efficacy of law in actual patterns of operation. In this sense it, can be contextually unrealistic to hide behind the myth of impartiality with a claim that the law might then be better implemented in practice. Furthermore, there have been serious doubts in the past as to whether any participant can be "impartial," and we should recall the Soviet attitudinal inhibitions toward an expanded role for "neutral" men (e.g., the Secretary General) or commissioned groups (e.g., ONUC during the Congo crisis).<sup>95</sup> Recent Israeli condemnation of the U.N. entity investigations of alleged Geneva law violations reiterates these points and it helps to support the viewpoint that "impartiality" should not be sought after as much as an inclusivity of varied perspectives so as to assure an aggregate "partiality" and a cooperative consensus (the shared expectations and demands of the community rather than a continuation of the myth (which is now being challenged)

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<sup>94</sup> Concerning alternative or supplemental modalities within the same general structure, see S.C. Report, supra note 85, at 79, where there is noticed a possible role for an executive head (High Commissioner) and a committee of legal experts. These two bodies could participate within the same new organization or within the complexities of the United Nations system. In all fairness it should be noted that the consensus functioning would take place in the General Assembly; but even then there are problems worth exploring, see text infra.

<sup>95</sup> See, e.g., Claude, supra note 93, at 301.



of organizational impartiality.<sup>96</sup> This last view also serves the preferred goal of a wide participation in the process of international decision-making and repudiates appeasement and indifference, which are often aligned with an "impartiality" stance, as being ultimately more conducive to a world of disorder and human indignity. Again, rules cannot protect us from ourselves and it seems that an inclusive effort at guarding each other against our own excesses is the best approach.

The Secretary General's Report also mentioned the possible role of the United Nations agencies in a continued concern for law effectiveness. There are recognitions of the possible contributions of the United Nations Commission on Human Rights; the creation of special committees to study specified problems; the role of a new Human Rights Committee under the International Covenant on Civil and Political Rights and the Optional Protocol; the more traditional roles of the General Assembly, the Secretary General, the Security Council, and the Economic and Social Council; and the precedent roles of UNESCO under the regulations annexed to the 1954 Hague Convention for the Protection of Cultural Property.<sup>97</sup> The Report states:

Already, fact-finding functions relating to the application of the provisions of some of the Geneva Conventions have been included in the terms of reference of ad hoc bodies established by the General Assembly and the Commission of Human Rights with the approval of the Economic and Social Council.<sup>98</sup>

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<sup>96</sup> For evidence of the Israeli condemnation of U.N. investigatory efforts, see, e.g., Greenspan, "Human Rights in the Territories Occupied by Israel," 12 Santa Clara Lawyer 377 (1972); and 2 Israel Ybk. on H.R. 154 (1972), also emphasizing the need for a more inclusive, authoritative fact authenticating process.

<sup>97</sup> For the UNESCO role, see S.G. Report, supra note 85, at 23-29. Note that the parties to a conflict must still appoint their own representatives and a Commissioner General on an ad hoc basis, though the system described does have an operational experience in a recent armed conflict. Id. at 27.

<sup>98</sup> Id. at 77. See also id. at 110, concerning the creation of a Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of Occupied Territories (G.A. Res. 2443 [XXIII] [1968]), and the 1969 action of the Human Rights Commission through the establishment of a special investigatory group concerning Israeli viola-

No doubt these roles are helpful and the training and education programs under UNESCO or UNITAR are most important, but the Report itself recognizes a further need for an agency of implementation which functions on a "durable standing basis" with specialized expertise.<sup>99</sup> Moreover, the recent denial of the use of the UNESCO headquarters in Paris for a conference on the abolition of torture sponsored by Amnesty International points out the need for an active implementary organization which is able to function outside of the normal U.N. structural maze and the general ineptitude of organizations with an "impartial" stance on matters of humanitarian (indeed, human) concern. Although Amnesty International had a contract for the use of the UNESCO facilities, permission was denied under a "general rule" that organizations utilizing such facilities refrain from criticizing member states or "use material offensive to any member state."<sup>100</sup> Well, one can just about predict the trend in UNESCO or other U.N. entity decision with such a broad and unoffending stance. And it is inadequate.

### 3. The United Nations Framework: Competence and Conditioning Factors.

Here we will briefly explore the general framework of the United Nations as previously constituted and presently developing, and we will identify some of its present imperfections and less than satisfactory trends concerning the implementation of the Geneva Conventions (recognizing that a special U.N. Commission could be created in the future which might overcome some of the present difficulties). A look at the U.N. Charter reveals the formalized expectations concerning the allocation of competence and also an authoritative basis for an active United

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tions of the 1949 Geneva Conventions. A most valuable exploration of the U.N. role in the investigation of South African violations of human rights can be found in J. Carey, UN Protection of Civil and Political Rights 95-126 (1970).

<sup>99</sup> For a recent critical analysis of the U.N. entity reporting systems, trends in decision and the general predispositional inhibitions to effective human rights implementation which permeate present U.N. system entities, see J. Humphrey, "Human Rights and World Law," work paper, Abidjan World Conference on World Peace Through Law (Aug. 1973), at 6-7, passim.

<sup>100</sup> See "U.N. Unit Drops Support of Conference on Torture," N.Y.T., Dec. 4, 1973, at 2, col. 4.

ted Nations role.<sup>101</sup> The preamble of the Charter expresses a shared determination of the peoples of the United Nations "to reaffirm faith in fundamental human rights" and "the dignity and worth of the human person" and to "establish conditions under which justice and respect" for international obligations can be maintained.<sup>102</sup> In the following analysis it is assumed that these shared determinations are still supported by the international community and, indeed, due to the increase in U.N. membership over the years and the dynamic nature of the document it is argued that no contrary assumption should be considered.

Article 1(3) of the Charter declares, as a major purpose of the United Nations, the effort to achieve international cooperation in solving problems of a humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms. Article 2(4) reveals an expectancy of obligation on the part of members to refrain from the threat or use of force which is inconsistent with the purposes of the United Nations (e.g., force which is inconsistent with the purpose, articulated in Articles 1, 55(c) and 56, to achieve respect for human rights-- in other words, force which constitutes a denial of human rights in time of armed conflict as well as human rights in general).<sup>103</sup> Article 55(c)

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<sup>101</sup> See Secretary General Report, supra note 54, at 109-110, stating: "Under the Charter of the United Nations the Organization has the authority to establish the international organs required for the purpose, inter alia, of promoting and encouraging respect for human rights and fundamental freedoms for all and for fulfilling the pledge of all members to take joint and separate action in cooperation with the Organization..."

<sup>102</sup> U.N. Charter, preamble.

<sup>103</sup> It seems clear that the use of force by a member in its "international relations" which denies or violates human rights would constitute a violation of the Charter, Article 2(4), and allow appropriate Organizational response. See, e.g., McDougal & Feliciano at 177-179 for an apt analysis of Article 2(4); J. Paust & A. Blaustein, supra note 57; and Paust & Blaustein, "The Arab Oil Weapon: A Threat to International Peace," 68 Am. J. Int'l L. 410 (1974). This is an important point which is little emphasized by others. Note that Article 2(7) should not preclude action in this connection, since violations of Geneva law are already known to constitute war crimes and are matters of international concern. See, e.g., 2 Oppenheim at 567 n. 2(II). In this connection it should be noted that Professors McDougal and Reisman have stated that, "...in the contemporary world, international peace and security and the protection of human rights are inescapably interdependent and that the impact of the flagrant deprivation of the most basic human rights of

declares that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all...";<sup>104</sup> and in Article 56 all members have pledged to "take joint and separate action in cooperation with the Organization" (emphasis added) for the achievement of such purposes.<sup>105</sup> Certainly these Charter powers and member duties constitute an authoritative basis for possible United Nations participation in an effort to supervise and coordinate the guarantees of the 1949 Geneva Conventions and, more specifically, for the creation of a subsidiary organ to encourage, promote, and supervise the implementation of Geneva precepts during armed conflict through cooperative international action.<sup>106</sup>

Present functional capacities in this area are not detailed in the Charter but a general view of the structure of the U.N. would help in an understanding of possible future roles or potential operational ability. One should remember, however, that by assigning close supervisory functions concerning the 1949 Geneva Conventions to the general U.N. structure, one could preclude the desired effectiveness, since the specialized functional aspects and concerns of Geneva law implementation could be dissipated in the maze of greater problems which the U.N. structure must now face (e.g., the broader problems and the significantly more "political" concerns involving state recognition, state membership in the U.N., state "aggression", state "intervention", and so forth).<sup>107</sup> A recent example of U.N. functional inability in this regard (beyond a post hoc emer-

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the greatest mass of the people of a community cannot possibly stop short within the territorial boundaries in which the physical manifestations of such deprivations first occur." McDougal & Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern," 62 Am. J. Int'l L. 1, 18 (1968).

<sup>104</sup>Note that Article 60 declares that the responsibility for the discharge of the organizational functions in promoting respect for and observance of human rights rests with the General Assembly, though the Economic and Social Council (ECOSOC) also has powers in this area.

<sup>105</sup>This member pledge is similar to common Article 1 of the Geneva Conventions. Note that separate action is also pledged--presumably in order to assure some action in the event of organizational ineffectiveness.

<sup>106</sup>See, supra note 104; and U.N. Charter, Art. 22.

<sup>107</sup>See also U.N. S.G. Report, supra note 54, at 11; "U.N. Rights Group Is Under Attack," N.Y.T., Mar. 10, 1974, at 1, col. 1; letter,

gency relief coordination effort) occurred during the violent emergence of the new state of Bangladesh.<sup>108</sup> As Marc Schreiber has correctly pointed out, the United Nations "was established to prevent international wars and not to regulate the manner in which wars would be conducted."<sup>109</sup> Although this is too simplistic, today it seems that the functional direction must still primarily concern conflict management questions in the broad sense; and these might well require a different and interfering focus, balance, or sanctioning effort, and might ultimately preclude a continuous and effective regulation of the more particularized law of the Geneva Conventions through the general U.N. structure. Even if a specialized agency is created, the overriding purposes and politics of the general organizational entities (the U.N. primary organs) may preclude effective Geneva law implementation and supervision due to higher entity concerns or drawbacks (though this does not necessarily have to be the case).<sup>110</sup> Higher entity concerns and pervasive political differences on the "larger" questions seem to have played a key role in the imperfect attempts to implement the Geneva Conventions through U.N. entities in 1967 and more recently in the Mideast and also in Vietnam and Bangladesh.

The present operational ability of the general U.N. structure to respond to implementary needs seems to be tied to the allocated competence of the General Assembly. The General Assembly has the power to discuss any questions or matters within the scope of the Charter and to make re-

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<sup>108</sup> For a survey of the U.N. emergency relief role in the Indian, Bangladesh, Pakistan crisis, see Gottlieb, "The United Nations and Emergency Humanitarian Assistance in India, Pakistan," 66 Am. J. Int'l L. 362-365 (1972). The lack of any vital U.N. role in the protection of human rights during the Vietnamese conflict is a matter of common knowledge and regret; in both of these recent conflicts the ICRC has been far more active and effective (except in North Vietnam). See also Freymond, supra note 77.

<sup>109</sup> Statement of Mr. Marc Schreiber, Director, Secretariat Human Rights Division, U.N., at the 14th Hammarskjold Forum, March 16, 1970, When Battle Rages, How Can Law Protect? 54 (J. Carey ed. 1971). See also Freymond, supra note 77, at 248, stating that in the past the ICRC was able to act "at a time when the United Nations was not in a position to act;" and Petrowski, Law and the Conduct of the Vietnam War, 2 The Vietnam War and Int'l Law 439, 455, and 457-58 (1969). For a more detailed insight into trends and policies connected with U.N. efforts to manage the overriding problems of armed conflict, see Claude, supra note 93.

<sup>110</sup> One should not throw the new international organization into the U.N. structural maze merely for the sake of bureaucratic convenience, especially if independence would allow a more effective functioning and not

commendations in certain cases.<sup>111</sup> Of course, these would not concern the day to day Geneva implementation requirements since there are time and other considerations which would preclude General Assembly ability to respond to continuous and more particularized needs. The General Assembly also has a duty to initiate studies and make recommendations to encourage the progressive development of international law and its codification (usually handled in the Sixth Committee).<sup>112</sup> This is a most important function, but an examination of the International Law Commission activities discloses that work often proceeds for several years and that the outcomes are of a relatively general nature (i.e., not conducive to particularized guidance functions which are necessary for Geneva law implementation). The General Assembly shall also initiate studies and make recommendations to assist in the realization of human rights and fundamental freedoms.<sup>113</sup> Under this power, the General Assembly has recently requested the aid of the Secretariat, and the Secretary General complied with two reports on the respect for human rights in time of armed conflict. Curiously, the General Assembly also authorized the Secretary General to "take all other necessary steps to give effect to the provisions of the present resolution," which affirmed three principles of law (already identifiable in customary international law) and called upon states to join certain conventions of the law of armed conflict.<sup>114</sup> No one has

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entirely preclude U.N. assistance. However, a counterpoint would concern the already existant broad framework which might be an aid to the new organ.

<sup>111</sup>U.N. Charter, Article 10.

<sup>112</sup>U.N. Charter, Article 13(1).

<sup>113</sup>U.N. Charter, Article 13(2).

<sup>114</sup>G.A. Res. 2444, Respect for human rights in armed conflicts, 23 U.N. GAOR, Supp. 18, at 50, U.N. Doc. A/7218(1969) (unanimously affirming the 20th ICRC Conference at Vienna (1965) Resolution XXVIII).

yet suggested that this action authorized the Secretary General to supervise the application of these three principles in a manner usually contemplated for a U.N. subsidiary organization, but the language authorizing "all other necessary steps to give effect" seems to be broad and an important delegation of authority.<sup>115</sup> We would have to await, however, further Secretariat action under this clause to test acceptability of the action by reference to responding demands and expectations--there are no other indicia of such a broad delegation of implementary authority known to the author.

The General Assembly also has the organizational responsibility for the promotion of respect and observance of human rights and for the co-ordination of the cooperative efforts of members and specialized agencies (such as UNESCO and the ILO) in that endeavor.<sup>116</sup> And in the exercise of the above functions the General Assembly can create a subsidiary organ to give specialized attention to the problems connected with Geneva law effectiveness,<sup>117</sup> while also utilizing another subsidiary body (the International Law Commission) for the progressive development and interpretation of Geneva law. Note also that should Geneva law violations (because of the number of participants, impacts, and so forth) become of such magnitude that they affect international "peace", "security", "friendly re-

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<sup>115</sup>Note that the Secretary General has offered his services in prior conflict settlements and has also coordinated certain advisory services for governments in the field of human rights. See U.N., Everyman's United Nations--A Five Year Supplement 158-159 (1971).

<sup>116</sup>See U.N. Charter, Articles 55(c), 56, 58, and 60. Note that the ECOSOC has such power while operating "under the authority of the General Assembly." U.N. Charter, Art. 60. See also U.N. Charter, Art. 71; the ECOSOC may contribute as well by coordination with non-governmental organizations (NGOs) such as the ICRC. For an analysis of advisory and promotion practices by the U.N. structure see U.N. S.G. Report, Advisory Services in the Field of Human Rights, U.N. Doc. E/CN.4/995, E/CN.6/522 (1969).

<sup>117</sup>U.N. Charter, Article 22. Such an organ could apparently have the power to study situations, investigate matters, and report or make recommendations to the General Assembly (most of the fact finding functions). See Goodrich & Hambro, Charter of the United Nations 193-197 (rev. ed. 1949).

lations", or the "general welfare" (as those norm categories or dynamic, key legal terms are interpreted), the General Assembly can engage in relevant discussion, make appropriate recommendations, and in some cases, even take action under the precedent of the Uniting for Peace Resolution (if the unusual circumstances for a consensus and Security Council in-action exist).<sup>118</sup>

Of course the early view that the General Assembly was to "discuss, consider, and to recommend, but not to take action"<sup>119</sup> seems to outline present functional expectation, and it is still primarily a Security Council function to take appropriate action with respect to the higher level "threats to the peace, breaches of the peace, and acts of aggression."<sup>120</sup> The Security Council could also play important roles in an investigatory capacity,<sup>121</sup> by making recommendations for appropriate procedures or methods of adjustment (including the use of the International Court of Justice),<sup>122</sup>

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<sup>118</sup>See U.N. Charter, Articles 10, 11, and 14; and G.A. Res. 337A, Uniting for Peace, 5 U.N. GAOR, Supp. 20, at 10-12, U.N. Doc. A/1775 (1950) (involving the possible use of force "to maintain or restore international peace and security"). Rarely, it seems (and we hope), will violations of the Geneva Conventions per se be of such a magnitude as to meet the standard for operationalizing these powers.

<sup>119</sup>Goodrich & Hambro, supra note 117, at 150.

<sup>120</sup>U.N. Charter, Articles 39-51; and see Articles 12(1) and 24(1). See J. Carey, supra note 54, at 25 for a view of the problems connected with the Security Council use of the Chapter VII measures for the protection of human rights.

<sup>121</sup>U.N. Charter, Article 34. See also U.N. S.G. Report A/7720, supra note 54, at 10-11.

<sup>122</sup>U.N. Charter, Articles 36 and 38. See also Article 94(2), concerning enforcement of the judicial decision. J. Carey, supra note 98, at 51 states that "no instance is found where the Security Council, strictly speaking, has been asked to secure compliance with a judgment..." and that "UN help in enforcing judgments, whether through the Security Council or the General Assembly, remains untested." It should also be noted that the United States Reservation to ICJ jurisdiction operates in connection with multilateral treaties such as the Geneva Conventions.



or in the establishment of subsidiary organizations.<sup>123</sup> But, as with the General Assembly, it seems that the Security Council interests are at too high a level for a continuous and effective supervision of Geneva law and something which is capable of responding directly to all of the Convention implementary needs should be created.

The Economic and Social Council (ECOSOC) certainly has a general supervisory role to play as outlined in the Charter. This includes the ability to make or initiate studies and reports and to make recommendations to the General Assembly, specialized agencies or members (Articles 62[1] and [2]); to draft conventions for submission to the General Assembly (Article 62[3]); to coordinate with specialized agencies and non-governmental organizations (Articles 63 and 71); to receive member and specialized agency reports (Article 64); to perform functions assigned or approved by the General Assembly (Article 66); and to set up commissions for the promotion of human rights (Article 68; e.g., the Human Rights Commission). But these important functions do not allow a detailed and direct Geneva law implementary role except through the workings of a specialized commission under Article 68 (which is probably the best way of putting a Geneva Convention supervisory body directly into the U.N. structure if such is desired).<sup>124</sup>

Perhaps even the creation of a commission to operate within the U.N. structure is not an adequate means of assuring that all of the Convention implementary needs are met.<sup>125</sup> For example, there are problems of delay

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<sup>123</sup>U.N. Charter, Article 29.

<sup>124</sup>Note that a separate organization can be "brought into relationship with the United Nations" under Articles 57(1) and 63, apparently even to such an extent that Geneva organization recommendations may be transmitted through the ECOSOC to the General Assembly for appropriate U.N. action. Such U.N. action may even include the use of the International Court.

<sup>125</sup>This would also apply to the U.N. Commission on Human Rights. This particular commission may have too broad a perspective to deal effectively with the Geneva Conventions on a day to day basis.

and approval of commission action by higher U.N. entities, there are problems of commission inability to make authoritative treaty interpretations, and other problems exist concerning decisional and coordination functions which might best be met in a separate organization composed of all of the treaty signatories. And a more independent organization could focus the power of consensus onto specific problems in a direct manner rather than through the general U.N. structure where a fog of other problems and values may dissipate the specified focus on Geneva law.

A brief focus on the Human Rights Commission can illustrate certain inadequacies of a commission which functions within the general structure. Soon after it was created, the Human Rights Commission disclosed a functional incapacity which seems little changed through Vietnam and Bangladesh. It stated that it recognized "that it has no power to take any action in regard to any complaints concerning human rights."<sup>126</sup> The United Nations structure offers certain advantages but entities within it often have a tenuous functional existence which seems too interconnected with general structure politics. Not only did the Human Rights Commission have to recognize that fact when it was created, but it seems that it chose not to press for more power as an entity until a lapse of some twenty years when General Assembly "assaults on colonialism and South African apartheid" proved of some benefit for an expansion of commission capacity into, at least, the investigatory functional area.<sup>127</sup> Even today, the Commission is just beginning to utilize its investigatory functions<sup>128</sup> and it does not seem capable of pressing for the use of other functional powers. Furthermore, subsidiary entities, such as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, have experienced similar incapacities;<sup>129</sup> and although an Ad Hoc Working Group of Experts was created by the Commission in 1967 to perform investigative functions which have been gradually expanded, it seems that the Ad Hoc Working Group is not the type of institutional response

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<sup>126</sup>This statement was approved by the ECOSOC in Res. 75(V) (1947), quoted in J. Carey, supra note 98, at 96 n. 8.

<sup>127</sup>See id. at 96, and at 90-91. Carey also states that the U.N. lagged behind European and Inter-American regional efforts at human rights effectiveness, and that the "outbreak of human rights investigation" from 1967 to 1969 by the Commission was a novel development.

<sup>128</sup>See id. at vii and viii (statement of Mr. Korey), at 125 (statement of Professor Jankovic), and at 90-91. See also supra note 107.

<sup>129</sup>Id. at 85-87. See also the more recent condemnation, Humphrey, supra note 100.

which is needed for Geneva law implementation.<sup>130</sup>

Apparently there has been some recognition of what we have outlined (though perhaps only partial), for if we consider the operational system proposed in the 1966 International Covenant on Civil and Political Rights we find that an attempt is made to by-pass the U.N. Commission on Human Rights and to create a special Human Rights Committee.<sup>131</sup> The new committee will receive reports of progress from parties to the treaty, study reports, comment as appropriate, coordinate with the ECOSOC as appropriate, consider state requests for examination of violations under certain restrictive conditions, or appoint a conciliation commission with the consent of all parties concerned, and submit an annual report of its activities through the ECOSOC to the General Assembly.<sup>132</sup> Though hardly ground shaking in functional ability, this Human Rights Committee does have some of the qualities of continuity and directness which other organizational structures do not possess; but even the proposed committee represents an imperfect effort at best and it would not seem structurally competent to handle the issues of Geneva rights in times of armed conflict.

#### Functional Needs and Capacities

Thus far in our focus on Geneva law effectiveness and supervisory systems we have sought to discover some of the underlying qualities of international law and its operative base, the nature and imperfections of the implementary systems under the Geneva Conventions, and the structural capacities for Geneva law implementation which presently exist and

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<sup>130</sup>See *id.* at 92, 95-96, and 125 concerning the creation of the Ad Hoc Working Group and its expanded powers (which even included the investigation of certain Geneva Convention violations by 1969). Carey seems to conclude, however, that there is no real coordination within the U.N. structure. See *id.* at 92-93.

<sup>131</sup>International Covenant on Civil and Political Rights, article 28, adopted by G.A. Res. 2200(XI), 21 U.N. GAOR, Supp. 16, at 52-58, U.N. Doc. A/6316 (1966) (not yet in effect).

<sup>132</sup>See *id.*, articles 40-42, and 45. These investigative and conciliatory functions already exist within the General Assembly and the ECOSOC, and Article 44 of the Covenant recognizes that such organs may still pursue their own procedures.

will predictably continue within the United Nations. Now, rather than attempt to rationalize support for a new system as the fulfillment of our functional needs, it would be better to identify and explore the various kinds of functions which a new entity could possess. This leaves the ultimate form to its creators: but an actual proposal is offered in Annex A which, though not itself critically analyzed, might prove useful for further study and a constructive community effort.<sup>133</sup> Furthermore, it is recognized that all of the present participants in the international legal process, especially those mentioned thus far, can in the aggregate make a great contribution to Geneva law efficacy. However, the point is that some new structure could have even more of an impact on law implementation and it is not assumed here that it is beyond the capacity of present state elites participating in ongoing Geneva Conferences (such as those designed to adopt new Geneva Protocols) to consider the types of functions a new entity could possess and to reach a consensus on a new constitutive instrument, or, perhaps, on an instrument which constitutes several "split" (or loosely or informally integrated) organizational entities which states could adopt with varying levels of approval by the international community. Certainly we can do better.

Though imperfect, the following functional categories are offered here for analysis: (1) Goal value identification and clarification functions, (2) Investigative functions, (3) Supervisory functions, (4) Deliberative functions, (5) Recommendatory functions, (6) Application functions, (7) Coordination functions, and (8) Enforcement functions (not covered above).<sup>134</sup> It should be useful to relate these functions

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<sup>133</sup>Note that the present ICRC Draft Protocols for supplementation of the Geneva Conventions contain a reference to the creation of a new international organization, but no such creature is offered for analysis. See ICRC, I Basic Texts 3 (Art. 10) (Jan. 1972) (proposed draft Protocols to the Geneva Conventions, Conference of Governmental Experts, Geneva, 3 May - 3 June 1972).

<sup>134</sup>These functions are categorized in a way which seems useful for analysis in this particular question of Geneva law implementation in the context of a developing world public order. Users of the McDougal-Lasswell approach will recognize that the value identification and investigative categories utilized here touch upon McDougal-Lasswell decisional functions categorized as the Intelligence, Promotional (or Recommendatory), Prescribing and Invoking functions as well as the Appraisal function. The supervisory function used here correlates most closely to the McDougal-Lasswell Intelligence, Promotion and Invoking functions, and others may be correlated as follows: deliberative (Prescription); recommendatory (Recommendatory, Invocation, and Application); application (Application--pre-enforcement phase); coordination (Invocation and Application); and enforcement (Application--enforcement phase). Also, the reader should note that performance of any of these functions necessarily

to such concepts as usefulness or workability, certainty of standard, flexibility, and acceptability. Any particular proposal should be analyzed with such concepts in mind, but here we can only allude to them in relation to a general functional capacity.

# 1. Goal Value Identification and Clarification (Intelligence and Prescription)

Perhaps one of the most important and needed functions today concerns the authoritative identification and clarification of goal values (legal policy) and relevant expectations which the general community shares. Presently, there is no authoritative institutional structure for the identification of Geneva goal values and shared expectations (much less the processing and dissemination of such) and the only type of state response has involved sparse, *ad hoc* conferences or working groups of experts. The only possible exceptions to this void are the useful efforts by the ICRC in preparing commentaries to the Conventions, the U.N. Secretary General in preparing reports and the continuous efforts of each to identify the boundaries of consensus in connection with special problems and to propose new drafts and Protocols for their solution. It seems that effective Convention implementation would require a more authoritative and continuous clarification of community policy and an up-to-date measurement of consensus when several of the Geneva provisions are subject to new and expanded interpretation as combat techniques, technological developments, changes in the nature of armed conflicts, prescriptive developments and trends in decision in other interrelated legal spheres<sup>135</sup> stimulate new demands and

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involves the use of other functions. See also Lasswell, *supra* note 29, at 86-93; Lasswell & McDougal, *supra* note 11, at 387; and McDougal, Lasswell & Chen, *supra* note 4, at 260-264. In the last cited material, the Intelligence function is said to also involve: advisory services, special studies, the reporting system, observation, fact-finding missions, investigation, and others. In McDougal & Feliciano at 351, there is an indication that recommendatory functioning, when considered as a strategy of sanction, can involve far more than the mere promotion of policy for later prescriptive decision phase effort and can involve invocation and application where "recommendations for the resolution of the immediate situation" are made. It might also be helpful to point out that prescription, as a strategy of sanction, can similarly involve an interconnection of decision phases when the community resolutions are also created for a sanction purpose.

<sup>135</sup>As in the development of general human rights, terrorism, restraints on the initiation of violence, weapons regulation, etc.

expectations of participants in the ongoing social process and create new goal values which are relevant as guides to an authoritative interpretation of the various Geneva articles in context. We have explored above the role of world community expectations as an operative base of law and have recognized that rules per se cannot protect us from ourselves. With these basic recognitions, it becomes evident that an authoritative institutional mechanism for expectation identification is necessary for a more effective implementary effort.

Goal value identification could involve the authoritative provisional interpretation of terms, the development of new prescriptions or policy, an appraisal of policy and the formulation of criteria for state or organizational appraisal and response, communication of opposing demands or expectations, the growth and formation of consensus, research, data collection and sharing, and the coordination of Geneva precepts with other international norms and developments (environmental and predispositional).

As Professors McDougal and Lasswell have remarked and we have alluded to before:

The effective authority of any legal system depends in the long run upon the underlying common interests of the participants in the system and their recognition of such common interests, reflected in continuing predispositions to support the prescriptions and the procedures that comprise the system.<sup>136</sup>

And they also stated that "[e]ffective, comprehensive universality, despite the faint shadows of worldwide organization does not exist. It is for the future...";<sup>137</sup> which means that there are regional diversities in rule interpretation and that in many instances the signatory powers are only "rhetorically unified."

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<sup>136</sup> McDougal & Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," 53 Am. J. Int'l L. 1, 4-5 (1959).

<sup>137</sup> *Id.* at 3. The authors state that universal words do not imply universal deeds. They have pointed out that the "universality" of international law is not comprehensive, that different societies or regions often perceive law in differing ways, and that there is sometimes little more than a rhetorical unification (not an effective, comprehensive mutuality of legal expectancies). Given the problems connected with the formation of a consensus of legal expectations and the even more elusive notion of an international morality, it seems that law effectiveness should more properly rest upon what Professors McDougal and Lasswell term the recognition by participants of shared expectations and "underlying common interests" (e.g., the mutuality of self-interest).

Professors McDougal and Feliciano have also expressed the notion that rule prescription is a one time shot at the expression of community expectation and that "rules" do not dictate specific decisions but "guide the attention of decision-makers to significant variable factors in typical recurring contexts of decision" and serve merely as "summary indices to relevant crystallized community expectations."<sup>138</sup> Furthermore, they state, "[a]mong the factors that bear immediately upon the prescription and application of community policy are common expectations as to the character and efficiency of the technique and technology of violence."<sup>139</sup> They add that technological developments make plain the necessity of continued appraisal of goal values and a search for dynamic expectation.<sup>140</sup>

How strange it seems that though the need for continuous goal value identification and clarification has been recognized, men (or rather the state elites with dominant state roles) have devised no means for such continued activity within an institutional framework.<sup>141</sup> Further, it appears that a continuous meeting of signatory representatives in some organizational structure could fulfill many of these functional needs and that such an approach would also be workable, acceptable, flexible in responsive capability, and provide a necessary continuity and certainty of policy standards at given moments.<sup>142</sup> To such an organized struc-

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<sup>138</sup> McDougal & Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War," 67 Yale L. J. 771, 815 (1958).

<sup>139</sup> Id. at 805-806.

<sup>140</sup> Id., quoting The Flick Trial, 9 L.R.T.W.C. 23 (1949).

<sup>141</sup> The most notable private effort in this regard has been that of Mr. Pictet of the ICRC. See, e.g., J. Pictet, The Principles of International Humanitarian Law (1966).

<sup>142</sup> The ICRC has proposed that a "meeting" of High Contracting Parties be convened whenever the "Depositary State" or one-fifth of the signatories or the ICRC request such, and that the representatives "study problems" concerning Geneva law "application" or likewise examine any amendment proposed by a signator. See ICRC, I Basic Texts 7 (Art. 9) (Jan. 1972). Others (not to be mentioned here) have seriously proposed that implementary needs be handled by national ombudsmen who might meet once in a while (perhaps forming someday an unoffending group known as the Fraternal Order of Ombudsmen). This last comment is by no means meant to disprove the goal of supplementing an international implementary system

ture could be added subsidiary bodies for long term research and law development;<sup>143</sup> and advisory bodies on economic, medical, science and technology, military, and other matters could provide useful interdisciplinary input for policy clarification, factor analysis, criteria formulation, decision appraisal, or other purposes.

In connection with the Geneva Conventions, such a functional entity could be designed to make authoritative provisional determinations concerning questions presently left for each state to determine on its own and often without a comprehensive input from various disciplines--questions such as: when do the Geneva Conventions apply to a conflict;<sup>144</sup> how much of the provisions of the Conventions are applicable; who is entitled to what types of protection; in what circumstances; with what strategies of implementation; and so forth. Certainly some system for goal value identification is required if these questions are to be adequately and rationally answered in given situations, and if we are to move beyond what Professor McDougal views as a mere "rhetorical unification" or what Professor Claude has referred to as the imperfect institutional pattern of "diplomacy by conference."<sup>145</sup>

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with a U.S. national ombudsman or panel (commission). On such supplementary goals, see "Telford Taylor Urges Inquiry on Vietnam by a National Panel," N.Y.T., July 7, 1971 at 12, col. 1; letter to President Nixon by the Assoc. of the Bar of the City of N.Y. (Jan. 12, 1972); and Senator E. Kennedy, "Proposes A Military Practices Review Board In National Security Council" (April 29, 1971 press release) (a proposal largely drawn upon from Professor Gottlieb's remarks before the Senate Subcommittee on Refugees Regarding the Protection of Civilian Populations in Armed Conflicts seven days earlier).

<sup>143</sup>These bodies should clarify prior and present goals (policy), analyze past trends and conditioning factors which affected goal realization, project probable future trends and conditioning factors, and invent, evaluate and recommend new alternatives where needed. See McDougal, Lasswell & Chen, supra note 4.

<sup>144</sup>See U. Levie, supra note 81, at 8, suggesting the creation of such a functional power in an international system.

<sup>145</sup>For Professor Claude's condemnation of this stage of institutional development, see Claude, supra note 93, at 21-24.



## 2. Investigative Functions (Intelligence and Invocation).

Investigative functions can include the visitation of territory (observation); the survey of resources; the collection of data and making of reports, appraisal and recommendations; the receipt of governmental, private, and individual communications or petitions; the preparation of files on individuals suspected of violating the law of the grand-jury-type proceedings for a similar purpose;<sup>146</sup> and the conduct of hearings. Perhaps law effectiveness would be best served if all of these functions became operative through some system, but certain qualifications might have to exist for acceptability among some signatories (especially the communist bloc.).

There seems to be little doubt that these are also important functional capacities, for as stated recently the "mere existence of an official and impartial fact finding body might deter violations of human rights."<sup>147</sup> It is also evident that these functional capacities have been viewed by "sovereigns" with some fear and that investigative powers of organizational entities have a tenuous existence unless specified in an international agreement.<sup>148</sup> John Carey has recognized this problem of acceptability and has proposed a rather weak system of human rights investigation involving formal investigation only where a government consents and, then, with a secrecy of results until after the government has

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<sup>146</sup> See Carey, supra note 98, at 63. Precedent exists for the use of special observer/adviser representatives in certain actions by the U.N. and the ICRC. See, e.g., Gottlieb, supra note 79, at 408-409 and 411-412. (Special Representative to Nigeria on Humanitarian Activities--appointed by the U.N. S.G. with the concurrence of Nigeria, and Special Representative to Israeli Occupied areas). See also Kutner, "World Habeas Corpus: Ombudsman for Mankind," 24 U. Miami L. Rev. 352 (1970). For recommendations for the establishment of judicial machinery for the indictment of individual violators, see Carey, supra and Gottlieb, supra at 410.

<sup>147</sup> From the Montreal Statement of the Assembly for Human Rights (March 22-27, 1968), quoted in Carey, id. at 84. See also 2 Israel Yrbk. on H.R. 154 (1972), on the need for a fact authenticating process; Gormley, "The Use of Public Opinion and Reporting Devices to Achieve World Law: Adoption of ILO Practices by the U.N.," 32 Albany L. Rev. 273 (1968), cited in Gormley, "Future Implementation of the Universal Declaration of Human Rights by States, Multinational Institutions, and Private Organizations," work paper, Abidjan World Conference on World Peace Through Law (Aug. 26-31, 1973); and supra note 107.

<sup>148</sup> As in the case of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, as described by J. Carey, supra note

been given a chance to correct deficiencies.<sup>149</sup> Presently, the Ad Hoc Working Group has been granted authority by the Human Rights Commission to receive communications, hear witnesses, use "such modalities of procedure as it may deem appropriate," and recommend action to be taken; but the group may only investigate certain cases.

Many types or degrees of investigatory capacity are possible and the ultimate form for Geneva law implementation will depend upon the parties to the Conventions; but there exists one aspect worth further study since it involves the opportunity for direct individual input into the investigative and general legal process. It is the systematized use of the individual and non-governmental petitions, if not the creation of an actual forum for individual rights enforcement.<sup>150</sup> Rita Hauser has stated:

The Permanent Court of International Justice authoritatively ruled in 1928 in the Danzig Railway Official's case that if by a particular treaty the parties intend to confer rights on individuals, those rights should be recognized and enforced under international law.

The best illustration of this rule would be found in the Geneva Conventions of 1949...<sup>151</sup>

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98, at 85-87, and recent problems in connection with investigations into Geneva law application in the Mideast conflicts. See also Humphrey, supra note 100, at 7.

<sup>149</sup>Carey, supra note 98, at 92.

<sup>150</sup>See Annex B. For a recent case of the first monetary award to an individual for human rights deprivations in the European system, see The Ringeisen case, reported in 11 Int'l L. Mat. 1062 (1972). The case should prove to be a significant precedent.

<sup>151</sup>R. Hauser, "Int'l Law and Basic Human Rights," 23 Naval War College Rev. 51 (1971). In accord, letter to the author from Mr. Pilloud, Director of Principles and Law, ICRC, dated 26 August 1971, stating: "Some of the provisions of the 1949 Geneva Conventions distinctly imply the existence of the right of individuals to seek application of the Conventions." See Annex B.

Whether or not enforcement of individual rights is granted, however, remains to be seen. But absent even actual enforcement there are great uses to be made of the individual petition as an investigative aid. As John Carey has stated:

It has been persuasively argued that the most relevant sources of human rights information are neither governments nor NGOs but actual alleged victims or persons close to them.<sup>152</sup>

He also stated that by 1970 eleven European states had accepted the optional right of individual petition provided in Article 25 of the European Convention on Human Rights,<sup>153</sup> and that individual petitions are used systematically at regional levels while there is evidence that the number of individual complaints is not excessive nor an undue strain on the regional bodies or the national governments concerned (thus, pointing to acceptability and workability of such a policy responsive modality).<sup>154</sup>

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<sup>152</sup>Carey, supra note 98, at 135.

<sup>153</sup>Id. at 38, n. 8.

<sup>154</sup>Id. at 136. See also Boyle & Hannum, "Individual Applications Under the European Convention on Human Rights and the Concept of Administrative Practice: The Donnelly Case," 68 Am. J. Int'l L. 440 (1974); Schwelb, "The Abuse of the Right of Petition," 3 H.R.J. 313 (1970); Wilkoc, "Procedures to Deal with Individual Communications to Int'l Bodies: The Sub-Commission on Prevention of Discrimination and Protection of Minorities," 1 N.Y.U.J. Int'l L. & Pol. 277 (1968); and Parson, "The Individual Right of Petition: A Study of Methods Used by Int'l Orgs. to Utilize the Individual as a Source of Info. on the Violations of Human Rights," 13 Wayne L. Rev. 678 (1967). For a view of recently adopted provisional procedures in the Sub-Commission on Prevention of Discrimination, see Sub-Comm. Res. 1 (14 Aug. 1971), E/CN.4/Sub. 2(XXIV) CRP. 6 (18 Aug. 1971) (Dist. Restricted). The requirements for admissibility are detailed and in general there must be reasonable grounds to believe that the petition "may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms...." A "Model Communication" form for an individual petition to the Inter-American Commission on Human Rights can be found in the O.A.S., Inter-Am. Comm. on H.R., Handbook of Existing Rules Pertaining to Human Rights 48-49 (1970). For relevant statistics in the European context a most useful publication is Council of Europe, European Commission of Human Rights, DH(72)2 (Strasbourg, Feb. 1972). Although trends in regional organizational petitioning have been encouraging, there is a noted problem with past U.N. practice which will hopefully change now with the new Secretary General. See Lillich, "The U.N. and

Certainly the use of individual petitions could constitute a constructive step forward in allowing more individual participation in the law creation and application processes. Moreover, it seems that individual petitions and even judicial remedies or individual causes of action are critical to effectiveness of the law and that we cannot allow the system to remain aloof from the human values and experiences that more direct personal involvement in the legal process could provide. Furthermore, such individual remedies or invoking mechanisms could provide some meaning (in predisposition and practice) to the principle enunciated in Article 8 of the 1948 Universal Declaration of Human Rights (and concomitant human rights documents) that everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by law. (Note that Annex B proposes a more detailed recognition of this principle.) Certainly regional implementary mechanisms should strive to make this principle more effective when interrelated claims arise under the Geneva Conventions and regional human rights instruments. And one way of assuring a more "effective remedy by competent national tribunals" is to adopt sanction strategies which will realistically meet the need for injunctive relief to preserve the situation so that claims can be made to national tribunals for national tribunal relief. Too often commentators have been content with proposals for compensatory relief at the direction of an international tribunal and have not focused on the sanction objectives relating to prevention, deterrence, restoration, or even correction of individual violators except in war situations. Even a claim for compensatory relief could involve claims for injunctive relief invoked by the individual claimant, though some have rather simplistically asserted that questions of remedy for individuals merely involve after-the-fact determinations and that state elites are the only competent participants in the legal process for the raising of other sanction objective questions.

There remain certain questions concerning individual petitions, for example: should the mode be open to non-victims, indirect victims, anonymous petitioners, non-governmental groups, or everyone in any format? The answers might depend upon investigative purposes, capabilities of an investigative entity, or even degrees of actual consent of the state concerned. No single approach to the problem has been worked out in the regional human rights instruments, the U.N. entity procedures, or the 1966 Covenants and Protocol, and it would appear that consensus is still developing and that developments are sometimes rapid, sometimes slow, in this area. It seems that as early as 1815 international bodies were considering certain communications from private groups,<sup>155</sup> and the United Na-

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Human Rights Complaints: U Thant as Strict Constructionist," 64 Am. J. Int'l L. 610 (1970), and references cited.

<sup>155</sup> Id. at 130 (Congress of Vienna).

tions framework allows for some private informational input under the Charter itself;<sup>156</sup> but a recent effort in the area of human rights has only been able to offer such a modality in an Optional Protocol and then with certain limitations which could almost qualify the "right" of petition out of existence.<sup>157</sup> Practice under the European Convention, however, has been more substantial and promising; and even practice under U.N. entities has been expanding.<sup>158</sup> The point of emphasis here is that individuals do participate in the ongoing international legal process, whether as law creators, mere claimants, sanctioners, etc., and it is incorrect to argue that individual input has never been allowed in international organizations before the 1950's.<sup>159</sup>

### 3. Supervisory Functions (Intelligence, Promotion, and Invocation)

These entail the creation of entity capability for men to guard each other against their own excesses and to supervise action for the purpose of implementing identified and clarified policies. These functions, when coordinated with the goal value identification and clarification and the investigative functions, form the heart of any preventive law program and probably the only crucial organizational capacities needed for law effectiveness (much of the other functions involve after-the-fact or community "response" functions, and would not be needed if prior sanction strategy had worked).

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<sup>156</sup> See U.N. Charter, Articles 57 and 71; and Carey, supra note 98, at 137-138 (the ILO, for example, allows NGO petitions if the NGO is situated within the offending country, but the ILO does not allow direct individual petitions). For some views of the ILO experience, see Johnston, *The International Labour Organization* (1970); and W. Gormley, supra note 147.

Note that the U.N. Discrimination and Minority Sub-Commission has adopted rules on admissibility of communications from non-governmental sources, and the Sub-Committee on Petitions of the General Assembly Committee of 24 on decolonization considered proposals for guidelines on admissibility (including anonymous petitions and communications originating inside or outside of the relevant territory). See 6 U.N. Law Rep. No. 1, at 1 (Carey ed., Sept. 1971).

<sup>157</sup> Optional Protocol to the Covenant on Civil and Political Rights (1966) (persons must be subject to the jurisdiction of the offending state and no anonymous petitions are presently accepted).

<sup>158</sup> See Council of Europe, European Commission of Human Rights, supra note 154. See also Carey, "Progress on Human Rights at the United Nations," 66 Am. J. Int'l L. 107 (1972); and supra note 154.

<sup>159</sup> See, e.g., McDougal, Lasswell & Reisman, supra note 4, at 256

Supervisory functions can include investigative capacities, control, trouble shooting roles, trial observation, training and education, protection, and coordination with or implementation of humanitarian functions. We have already discussed the supervisory roles contemplated under the Geneva Protecting Power system, and such functional capacities could be incorporated into an organization to aid in Geneva Convention implementation. Already the ICRC has been active in the promotion of policy and new responses to humanitarian needs (as far as their overall institutional objectives and capacities will permit). The ICRC has been active in arranging conferences of experts (governmental and some non-governmental) to consider new policy and implementing possibilities, has promoted the results of such meetings, and has even recently urged that parties to the 1973 Mid East war apply new proposed Geneva Protocols designed to assure greater protection of civilians.<sup>160</sup> Of course, the ICRC has been quietly active as a Convention supervisor. Another proposal has been made by Professor Howard Levie for the creation of an International Committee for the Enforcement of Human Rights during Armed Conflict (ICEHRAC) which would have the authority to "police compliance with the law of armed conflict" and to enter territory of each party to the conflict.<sup>161</sup> Along

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and 261-267; H. Lauterpacht, *International Law and Human Rights* (1950), Paust, "My Lai and Vietnam: Norms, Myths, and Leader Responsibility," 57 *Mil. L. Rev.* 99, 119-123 (1972); and Paust, *supra* note 38.

<sup>160</sup> See "Red Cross Urging Code on Civilians," *N.Y.T.*, Oct. 12, 1973, at 18:3.

<sup>161</sup> H. Levie, *supra* note 81, at 5 and 8. Professor Levie noted that France had recommended the creation of a High International Committee for the Protection of Humanity at the 1949 Diplomatic Conference but the recommendation did not receive necessary support. Professor Levie's work considers another supervisory function--the supervision of population safety zones. See also U.N. S.G. Report A/7720, *supra* note 54, at 49-51. A recent attempt to create such a zone under ICRC supervision occurred in Bangladesh in the city of Dacca. See *Wash. Post*, Dec. 9, 1971 at 16:1. There is presently no entity more capable or acceptable than the ICRC for the performance of this safety zone supervisory function. As the use of this particular protection mechanism expands it should foster a further recognition of the need for some new Geneva law implementation institution. The U.N., however, did engage in substantial emergency relief operations. See Gottlieb, *supra* note 108.

these lines, it is suggested here that an additional entity which might prove to be both useful and more acceptable to the parties to the Conventions might be called: Convention Implementation Advisers.<sup>162</sup> They could operate in coordination with a High Commissioner and educational staffs so as to provide advice to states concerning alternative means of law implementation, operative techniques, training, and education or preventive law programs. Such an entity could aid decision-makers at all levels by providing skilled guidance and specific options for law compliance, thus bringing policy directly into a problem context for "policy responsive" solutions at the local level.

Another important supervisory function involves "impartial" observation of trials under a state signatory or other entity system. The Geneva Conventions had recognized the need for impartial trial observation when trial by captors of prisoners of war (pws) and civilians (at least in occupied territory) occurred. The Conventions placed this trial observation responsibility under the Protecting Power system, with certain other possibilities mentioned in case of the failure to appoint a Protecting Power.<sup>163</sup> Furthermore, fundamental due process guarantees for the trial of all persons accused of having committed breaches of the Conventions were placed within the ambit of what the Protecting Power should guard, and the Protecting Power's presence during trial was itself recognized as one of these fundamental due process requirements. Since the trial of a pw, a war criminal, or any person by the capturing power (even if generally fair) could result in increased hostility and violence (including "reprisals" for the trial), it would seem necessary for any party to an armed conflict to seek some means of impartial trial observation and possibly some means of trial by neutrals for Convention breaches

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<sup>162</sup> Already the ICRC and the U.N. High Commissioner for Refugees (UNHCR) have been accepted in the role of an implementation adviser, and other trends in human rights advisory services point to a ready utility and acceptability of such an expert Geneva law entity. Certainly a government desirous of useful advice and practical experience with law implementation would welcome such an advisory role. See also 6 U.N.L.Rep. 45-46 (J. Carey ed. Aug. 1972) on the U.N. Seminar on the Status of Women and Family Planning in Istanbul (July 1972) and the use of the UNHCR by the Secretary General to assume primary responsibility for coordinating a twelve month program for Southern Sudan.

<sup>163</sup> See, e.g., GPW, arts. 100-101, 104-105, and G.C., art. 74. See also GPW, arts. 82, 84, 99, 102, 107, and 129-130, and G.C., arts. 71-72 and 74; and J. Pictet, 3 Commentary at 491-492. GPW, art. 105 is listed as one of the fundamental due process measures under Geneva law. See GPW, Art. 129 and G.C., Art. 146.

or at least the "partial" observation by the country or power of origin so as to avoid the difficulties inherent in trials of enemy combatants or civilians while the armed conflict still continues. The other possibility is that trials be postponed until the end of the conflict; but the usual practice is that no trial occurs in such instances.<sup>164</sup> Furthermore, the growing demands and expectations concerning human rights of a minimal due process would seem to require some form of outside observation, except in cases where state security is directly involved and to a necessarily prejudicial degree, if the forum state is at all politically pragmatic and there can be no doubt that demands and expectations would incorporate recently documented due process requirements.<sup>165</sup> What form the actual supervision mechanism will take should be left to the signatories who are in the process of amending the Conventions and perhaps some flexibility in format should be offered for wider acceptability while the forum state retains the freedom to choose among several trial observation options specifically mentioned and created for service upon request. Some form of Geneva Protocol recognition of trial observation mechanisms should be made, however, and the time would seem ripe for acceptance of a proposal which retains some flexibility.<sup>166</sup> There has been a long history of workable trial observation, reporting and due process implementation among U.S. and other states which could not only provide an immediate framework for Geneva law and human rights implementation in cases of trial of foreign nationals by one of these governments, but which could also provide a useful experiential background for those involved with international observation of Geneva signatory trials and for those who do not have such a

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<sup>164</sup> It has often been suggested that during the conflict it would not be fair to try captured persons due to the unavailability of evidence for the defense, witnesses, etc., and to hostile feelings which are likely to permeate the proceedings. See, e.g., J. Pictet, 3 Commentary at 422 and 626, and 4 Commentary at 596. Quite possibly it could be equally unfair in some cases to await the end of the conflict, since some conflicts (notably Vietnam) have continued for years or decades.

<sup>165</sup> See, e.g., Paust, "Human Rights, Human Relations, and Overseas Command, 3 The Army Lawyer 105 (Jan. 1973), reprinted in 13 Revue de Droit Penal Militaire et de Droit de la Guerre (Brussels, 1974).

<sup>166</sup> The ICRC, as well as many NGOs, has a long historic interest in some form of trial supervision by international observers and might back such a proposal in the 1973 summer Conference or thereafter. See Veuthey, "The Red Cross and Non-Int'l Conflicts," 113 Int'l Rev. of the Red Cross 411, 418 (1970). Moreover, the government of the People's Republic of Bangladesh proposed to further a new trend of inviting foreign trial ob-



background of experience and institutional arrangements themselves.<sup>167</sup>

Finally, it should be mentioned that the Red Cross has provided complementary aid in connection with trial observation and the broader education and advisory areas. ICRC publications, such as the recent *Teacher's Manual* and *Soldier's Manual*, are most useful and the United States Army has recently adopted similar instruction aids.<sup>168</sup> It is well known that other governments could expand their training programs and, no doubt, even the best troop educators could expand their programs. Indeed, signators have a duty under the Conventions to educate the entire populace (not just the soldier) on the Geneva precepts,<sup>169</sup> and it would seem that not only should more be done in this area but that most states would welcome expanded education and guidance functioning so as to more greatly assure that their state will not become known for violations of the Conventions. Too often it is forgotten that the soldier, after all, was at one time a member of the civilian population and that most of his psychological predispositions are well formed by the time he joins the military forces or initiates violence on his own or in connection with some nongovernmental or "private army". Furthermore, it has not been unknown (in prior conflicts or in Vietnam) that members of the civilian community have derogated from the Conventions in the past. An expanded educative role could even include programs of public broadcasts, lectures, advertisements, or other media usage, human rights seminars, seminars integrating human with "civil" rights, fellowship programs for individual study, and emphasis in primary and secondary schooling.<sup>170</sup> It is not too difficult to imagine forms of civilian education, nor to initiate effort in that direction if persons get involved.

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servers to forthcoming war crimes trials. See Paust & Blaustein, supra note 57, and documents section.

<sup>167</sup>For a useful analysis of the U.S. experience in trial observation under NATO SOFA, see Williams, "An American's Trial in a Foreign Court: The Role of the Military's Trial Observer," 34 Mil. L. Rev. 1 (1966); and A.R. 27-50, Status of Forces Policies, Procedures, and Information (1967).

<sup>168</sup>See 125 Int'l Rev. of the Red Cross 439 (1971).

<sup>169</sup>See text, supra.

<sup>170</sup>See Carey, supranote 98, at 17, noting the recent U.N. efforts (e.g., G.A. Res. 2445 and 2447(XXIII) (1969) and the new UNESCO publications). On implementary techniques for publicity, dissemination, and education within state entities, see U.N. S.G. Report A/7720, supra note 54, at 41-43; Int'l Institute of Humanitarian Law, Seminar Res., Guidelines for Military Instruction (Sanremo, Italy, Nov. 1972); U.S. Army Sub.

#### 4. Deliberative Functions (Prescription)

Necessarily, deliberative functions would already have been involved in goal value identification roles, but deliberative functions can also serve to focus community eyes on specific problems through discussion, consideration, and voting. This function is termed deliberative in order to emphasize a functioning beyond politicized rhetoric and also to point out that hesitant state elites need not necessarily fear that the outcomes of such a process would be viewed as "binding" legislative prescriptions as such. The results can lead to community response functioning or merely to a cooperative airing of difficulties depending upon the consensus at the time. It is a necessary functional capacity for any organization and it has been "customary in all international organizations that there should be one organ comprising all members or their representatives."<sup>171</sup> Furthermore, such a process may be more "workable" in the long run when there is representative participation by all signatories to the Conventions instead of a select committee of experts performing the deliberative functions, and it is likely to be viewed as more authoritative as well. One caveat here, however, is that law implementation cannot depend upon an institutionalized practice of "diplomacy by conference" or a mere continuation of Geneva Conferences. Some additional functions have to be established to get beyond the approach of creating new rules for the protection of human beings as if the words can protect us from ourselves.<sup>172</sup>

One should inquire more deeply though into a "voting" system, for although states have traditionally had a one state-one vote approach to consensus formulation, there are changes of thought concerning the effectiveness of such a voting system when (1) states are no longer regarded as the sole participants in the constitutive processes nor as the sole authority groupings or institutional structures, and (2) there are great differences among states in terms of: (a) bases of power such as population, technological development, military capability, financial capability, and (b) institutional patterns of shaping and sharing these base values. Questions might be asked as to whether population differences

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Sched. 27-1, The Geneva Conventions of 1949 and Hague Convention No. IV of 1907 (1970); U.S. D.A. Pam. 27-200, The Law of Land Warfare--A Self Instruction Text (1972); and D.A. Training Cir. TC 27-12, Your Conduct in Combat: under the law of war (test edition, April 1973).

<sup>171</sup> Goodrich and Hambro, supra note 117, at 149.

<sup>172</sup> For some interesting aspects of the futility of a program of implementation which is primarily dependent upon "diplomacy by conference," see Claude, supra note 93, at 21-24; cf. id. at 285-303 on institutional "preventive diplomacy" in connection with conflict management and U.N. Secretary General efforts in a context of cold war confrontation and super power political inabilities.

should be a predominant criterion because of the need for a human consensus measurement and the serving of the goal of wide participation in the decisional processes as opposed to mere state elite consensus and participation, or whether certain attributes of power should prevail due to a need for compliance with the outcomes of the institutional decision process and the support of power to legal efficacy. The author would propose a wide participation of persons or groups without weightings of power, since power often shifts but community consensus is not only a preferred goal itself but can also be an important base for authority and control. Questions in this area include considerations as to whether only state elites should be represented. Should weighted voting and state elite voting be adopted in some dual format to allow a more comprehensive (though still inadequate) consensus identification beyond the mere consensus of "sovereign" elites? Should state votes be split up into components corresponding to the divergent views prevailing within a state? Should regional consensus be considered and have regional priority where it can be demonstrated? Should we take public opinion polls or are these inadequate as well since they do not always provide a pattern of consensus over time?

The possible questions and combinations seem endless, but we should not forget that even the raising of such questions helps to point out some of the inadequacies of a mere state elite consensus. We must not forget as well, however, that in the present stream of history our representative authority focus is on the state; and as the Geneva Conventions remain primarily a treaty law to which states are parties, it seems that a state elite consensus as a measure of representative authority will probably be included in any Geneva law organization voting system. But a problem still remains as to whether the institutional set up will be authoritative enough for national or other decision-makers (whether executive, legislative, judicial, administrative). Certainly a decision-maker can supplement state elite consensus with whatever empirical evidence he can obtain from sociological inquiry and perhaps some form of dual voting format which would allow state elite and population weighting would be useful in that regard. Here the preference for population weighting is aligned with goals mentioned above, and this seems more useful than weightings based upon more fluctuating factors such as technological, economic, military, political, and other developments. It is not suggested, however, that we can look merely to population statistics and assume that state elite votes are representative of the population from which the state elite derives its position--some type of inquiry should be made into the extent of sharing of power in the internal political process before such a conclusion could stand, and even this slight intrusion would seem to require decision-makers to go beyond state elite consensus and population weighting in order to grasp through comprehensive analysis the contextually more realistic base of legal efficacy--the actual extent of shared expectations and demands in the community of man. Perhaps some day technology will allow men to consider problems and give input on important issues through a system of home media re-

ceiving and input or response mechanisms, thus partially eliminating the need for a "representative" decision-making institution in certain areas and the adoption of a "population response" system; but this is for the future.

Whatever the consensus measurement format, it is good to keep in mind the preferred goal of wide participation (the wider, the more inclusive). This preferred goal rests upon a premise that greater participation in the prescriptive process is more preferable than selective representation (or deference to elitist notions that small groups might consider all factors in a more "workable" manner--two questionable conclusions). It is not only preferable for democratic (or, in purely ideological myth, communist) value enhancing purposes, but also for law enhancing purposes since the greater the participation, the higher the potential for comprehensive analysis, a real consensus of expectation, inclusivity in identifications and demanded value outcomes, contextual realism and the desired outcome of an efficacious Geneva law or policy realization in practice. Furthermore, there is a greater likelihood of an increasing desire of participants in the world process to perpetuate and defer to a constituted structure and decisional process in which participation is wide. Exclusion of any state, group, or individual input into the prescriptive process (as in others) can only diminish law efficacy in the long run--it cannot enhance it or make it more "workable".

##### 5. Community Response Functions (Invocation and Application)

Here we can group the last four functions together since they involve organizational responses to events in the social process or responses to claims of "right" deprivation which have already occurred. The Recommendatory function can include power to recommend action or negotiation ("good offices", mediation, persuasion, etc.) as a means of initiating a process of dispute settlement or application of law to claims. The Application function is a decisional function which can include power to make authoritative and controlling determinations, to pursue the remedies (sanction objectives) of exposure, pressure, or condemnation, and to participate in an arbitral or judicial capacity. Actually, in its broadest sense, all associations of legal precepts with human conduct for characterization purposes involve application functioning and this application of law also involves intelligence, promotion, enforcement, and other functions as components of the decision process. Here we have in mind some designation of the more formalized institutional process for authoritative decision functioning primarily as an applying organ. The Coordination function as a response function can include contact with and recommendation to other international entities, the ICRC, regional organizations, private and other groups, and can involve the diplomatic and ideological strategies of sanction in most cases. Enforcement could include direct or indirect coercion, authorization of unilateral or multilateral action, and various types of sanction objectives (plus diplomatic, ideological, economic, and military strategies for the achievement of sanction objectives such

as prevention, deterrence, restoration, correction, rehabilitation, etc.).<sup>173</sup> As a general matter, it would seem that coercive enforcement should be left to the United Nations machinery at one level and to nation-state systems of criminal prosecution at the other, with a prevention sanctioning objective the primary concern of the Geneva implementary structure. For example, if an international penal system is needed to supplement the present state prosecution process (and this would seem desirable), it might be better to have such a system coordinated through the United Nations than through the more limited focus inherent in Geneva law implementation.<sup>174</sup> Similarly, conflict management questions, including the more broad focus on initiation of coercion across state boundaries and collective sanction activity which utilizes force or the threat of force against states or large groups, should be left to the United Nations since it is set up to deal with these questions and duplication here would not seem beneficial.

One expert has made a perceptive statement which might be useful in focusing on organizational response functions; he stated:

The most effective method for enhancing and protecting human rights...would include investigation and negotiation, followed where necessary by publicity, and in extreme cases by impartial judicial procedures...<sup>175</sup>

The same author states that exposure is a useful means for seeking com-

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<sup>173</sup>For an extensive and useful categorization of sanction policies, see Lasswell, *supra* note 29, at 103. For an extremely useful and comprehensive framework for inquiry into the community sanctioning process, see McDougal & Feliciano at 261-383. It is not possible here to make such a comprehensive analysis of sanctioning process (participants, objectives-perspectives, situations, base, or resource values, strategies, outcomes, effects) including an integrated analysis of all strategies (diplomatic, ideological, economic, military) in connection with all sanction objectives (prevention, deterrence, restoration, correction, rehabilitation, reconstruction). See McDougal & Feliciano at 280-353.

<sup>174</sup>For proposals for an international criminal court to supplement present state prosecution capacities, *see, e.g.*, Kutner, "Politicide: The Necessity of an Int'l Court of Criminal Justice," 2 *Denver J. Int'l L. & Pol.* 55 (1972); Stone, *An International Criminal Court* (Geneva 1971); Kutner, "World Habeas Corpus, Human Rights, and World Community," 17 *DePaul L. Rev.* (1967); Wright, "Proposal for an Int'l Criminal Court," 46 *Am. J. Int'l L.* 63 (1952); and Pella, "Towards an Int'l Criminal Court," 44 *Am. J. Int'l L.* 37 (1950). See also Kutner, *World Habeas Corpus* (1962).

<sup>175</sup>Carey, *supra* note 98, at 173.

pliance as it is "likely to exercise something of a brake on the authorities;"<sup>176</sup> but he also states that direct forms of intense coercion (which he labels "sanction") have "twin drawbacks of ineffectiveness and political sensitivity,"<sup>177</sup> and are unreliable because they usually fail to compel action and states fail to use them fully as a technique.<sup>178</sup> Another noted figure has made a relevant generality that "coercive powers...will be of little effectiveness for a very long time to come,...owing to the persistence of the belief in the myth of national sovereignty and its inviolability."<sup>179</sup> Many of the difficulties, however, might arise from the U.N. context and overriding political considerations rather than from the usefulness of techniques of coercion per se; but it may well be better to leave higher level coercion to the United Nations framework due to its authoritative and primary interest in conflict management and general international peace and security.

Certainly proper, however, would be efforts to exercise power in the recommendatory, coordination and application functional areas, and the contributing use of a High Commissioner (for negotiation and universal affectation of perspective) and an arbitral arrangement would seem most desirable at this time.<sup>180</sup> Negotiation or Recommendatory function

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<sup>176</sup>Id. at 109, 36 and 119 (stating that the U.N. Ad Hoc Working Group's "chief weapon is exposure" and public opinion). Note that ICRC reports on countries are rarely publicized. Id. at 101; but when they are some results seem to flow Id. at 118. Secrecy may be of some benefit in state to state negotiations, but not necessarily of predominant value in seeking law compliance.

<sup>177</sup>Id. at 36. Note that there are many types and intensities of sanction, supra note 151, so this statement must be viewed as a generality.

<sup>178</sup>Id. at 34, stating: "Too many influences affect third-party governments besides the plight of the victims." See id. at 22-27, concerning possible sanctions and those utilized in opposition to South Africa's racial policies. Note that sanctions against Rhodesia seem to finally be having some effect, though violations of U.N. Security Council resolutions have occurred (notably by the U.S. and other big powers since the time of the Nixon administration). See N.Y. Times, April 18, 1973, at 5:3.

<sup>179</sup>Statement of Ambassador Richardson of Jamaica, id. at 12.

<sup>180</sup>For an analysis of U.N. developments, see id. at 70-78. Note that the "most vigorous opposition to such a High Commissioner comes from the socialist (communist) countries;" id. at 71.

precedents abound and are to be found in recent practices under the institution of the U.N. High Commissioner for Refugees (UNHCR) which actually succeeded earlier efforts under the League of Nations, the ILO Fact-Finding and Conciliation on Freedom of Association body, the European system under the regional Convention on Human Rights, the Inter-American Commission accomplishments, the Conciliation Commission under the 1966 Covenant on Civil and Political Rights, and the office of the Secretary General of the United Nations, not excluding, of course, the achievements of the ICRC.<sup>181</sup>

In contemplating the possible roles of an arbitration tribunal, it should be kept in mind that although there exists a long record of compliance with judicial and arbitral decisions prior to 1947,<sup>182</sup> it seems that since then there have occurred a number of serious instances of system failure (pointing again to a primary need for preventive law mechanisms).<sup>183</sup> Perhaps arbitration is to be preferred more than judicial decision; and, in any case, the jurisdiction should rest on a consensual basis (our aim being the most practical means of achieving law effectiveness absent a benevolent dictator). However, use of judicial powers could be made in cases where an organ seeks an advisory opinion,<sup>184</sup> or where there is some likelihood of utility as when public pressure could be greatly enhanced even though the offender is not amenable to sanctions or is not likely to comply directly with court determinations. It may also be useful to explore the European Convention on Human Rights framework in more detail since individual petitions are considered there first by the Commission and then might proceed to either the Committee of Ministers or to the Court of Human Rights, but they usually go to the Committee of Ministers for a somewhat more politically feasible solution in the context of developing European integration and developing individual rights of participation in the implementary process.<sup>185</sup> Whatever the nature of

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<sup>181</sup> See *ibid.*; and Bissel, "The ICRC and the Protection of Human Rights," 1 Human Rights J. 255 (1968).

<sup>182</sup> See *id.* at 43-46. Professor Hans Morgenthau found fewer than ten cases of noncompliance in the 150 years prior to 1947, *id.* at 44; but today Oscar Schachter predicts that if compulsory jurisdiction was adopted there would be a greater chance of noncompliance with decisions, *id.* at 46.

<sup>183</sup> See also U.N., I.L.C., Draft Code of Arbitral Procedures, U.N. Doc. A/CN.4/SK.A(1956); J. Ralston, *International Arbitration from Athens to Locarno* (1929). For an up to date and thorough analysis of arbitration practice and potential, see W.M. Reisman, *Nullity and Revision* (1971).

<sup>184</sup> See U.N. Charter, Art. 96.

<sup>185</sup> See Carey, *supra* note 98, at 38-39 and 42. The European Court had heard only five cases by 1970 and each involved some Commission ac-

the structure adopted at Geneva for a formalized application decisional function (arbitral, judicial, or other). it might be useful to have a wide dispersion of applying arenas (as well as investigative and supervisory functional entities) so as to more greatly assure integration of effort, inclusivity, a ready access for various participants, and a regional expertise which could prove extremely useful for acceptability (authority), identification of particularized expectation which supplements Geneva precepts, crisis anticipation, contextual realism, and efficacious response (authoritative control).

### Conclusion

In this short article we have attempted to explore the operative basis of Geneva law, the sovereign inhibitions to Geneva law effectiveness, present system capacities, and general functional possibilities available for improving implementation. Far from being perfect, the above inquiry into functional capacities and potential does offer a basis for further study and concrete results in a field of urgent human need and concern. We have gone far beyond present considerations by government experts at the ongoing Geneva Conferences designed to establish Protocols for supplementing the Conventions which have, so far as is known to the author, only raised the question of national ombudsmen and a continuation of the diplomatic conference at the request of state elites or the ICRC; and yet I do not feel that we have gone beyond the potential for positive action or the expectations of those who ask why man cannot devise some better means to protect the victims of warfare. It is recognized, however, that the establishment of a particular structural arrangement for Geneva law implementation by governmental experts will not guarantee complete normative efficacy or a break from the practical "realities" of state elite dominance. We must try, however, and a new structural arrangement can incrementally affect patterns of authority and control. And some change in that regard, even if only incremental, seems worth the effort. To the author such is far more desirable than to continually operate under the "unrealistic" systems capabilities--past and present systemic responses are simply inadequate in view of shared policies, growing demands, more pervasive expectations, and an increasing interdependence of people and events in the global arena. What institutions men actually create in an effort to guard each other is a matter of future development and speculation. Surely new institutions will eventually emerge, however, and it is hoped that the present inquiry and proposals will offer some basis for rational effort and the continuing endeavor toward peace and an improved human existence.

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tion, but since then there is some promise for more Court involvement. See also Council of Europe, European Commission of Human Rights, supra note 154.



## ANNEX A

THE GENEVA COVENANT ON CONVENTION IMPLEMENTATION

THE STATES PARTIES TO THE PRESENT COVENANT,

Noting the almost universal acceptance of the 1949 Geneva Conventions by States as binding law and human expectation,

Affirming the fact that any situation to which the Geneva Conventions apply cannot solely constitute a matter of domestic concern within the jurisdiction of one Party but constitutes an event or matter of international importance and human concern,

Noting that situations to which the Geneva Conventions apply can also constitute a basis for affectation of international peace and security,

Considering that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Noting the universal acceptance of the Universal Declaration of Human Rights as the embodiment of normative values of the human community,

Determined to reaffirm belief in all fundamental human rights in time or armed conflict and the dignity and worth of our fellow human beings, and to establish effective machinery to promote conditions under which respect for the obligations arising under international law can be maintained and the law can become effective,

Agree upon the following articles:

Chapter I. General Structure

Article I.

I. There shall be established a Commission on Human Rights in Armed Conflict (CHIRAC). It shall consist of three primary organs and shall carry out the functions herein provided in accordance with the principles prescribed.

2. The three primary organs shall be:
  - a. The Council of Ministers.
  - b. The High Commissioner.
  - c. The Hearings and Arbitration Council.

## Chapter II. Council of Ministers.

### Article 2.

1. The Council of Ministers shall be composed of one representative from each signatory to the 1949 Geneva Conventions and the present Covenant.
2. Each signatory representative shall have one vote. Important questions shall be decided by a two-thirds vote of those present and not abstaining. All other matters, including whether a matter is an important question, shall be decided by a simple majority vote of those present and not abstaining.

### Article 3.

1. The Council of Ministers shall meet periodically but shall be so organized as to be able to function continuously.

### Article 4.

1. The Council of Ministers shall adopt its own rules of procedure. It shall elect its President at each session, and may establish such subsidiary organs as it deems necessary.
2. There shall be established two primary subsidiary organs which shall serve the Commission in advisory and other capacities with powers outlined by the Council of Ministers which shall include the value identification, investigative and other functions deemed necessary for the proper performance of their roles. The High Commissioner and the Hearings and Arbitration Council may directly utilize their services, and Parties to the Covenant and seek their advice through the office of the High Commissioner.
3. The two primary advisory organs shall be:
  - a. Advisory Committees on:
    - (1) Science and Technology.
    - (2) Military Affairs.
    - (3) Law and Policy.
    - (4) Economic Affairs.
    - (5) Administrative Affairs.
    - (6) Education and Communication.

b. Working Groups for.

- (1) Africa.
- (2) America.
- (3) Asia and Far East.
- (4) Europe.
- (5) Near East.

Article 5. The Council of Ministers shall be the primary deliberative body and may discuss any questions or matters within the scope of the 1949 Geneva Conventions, the present Covenant, and any subsequent protocols or amendments. The Council of Ministers may also propose or initiate studies, investigations, or measures of law implementation, and may make recommendations for the purpose of promoting the effective implementation of Convention law and principles or require reports of law implementation from Parties to the Covenant. Each Party to the Covenant shall respect the recommendations and decisions of the Council and shall facilitate their observance in all circumstances.

Article 6.

1. The Council of Ministers can make authoritative interpretations of the Convention precepts or the application of those precepts to specific situations, and may formulate criteria for normative guidance. It may also seek legal determinations through the International Court of Justice.

2. The Council of Ministers may formulate new standards or Convention law to be subsequently ratified by Parties, and shall make continued studies in that regard. The Council of Ministers or its subsidiary organs shall receive annual reports on law development and implementation as requested in order to facilitate this function.

Article 7. The Council of Ministers should coordinate its activities with the ICRC and any other entity established under this Covenant, and it can direct the activities of the subsidiary organs of the Council and make recommendations to other Commission entities. The Council may also coordinate its activities with other international organizations or private entities as desirable. The Council can receive communications from any source.

Article 8. Any Party to the Geneva Conventions and this Covenant may bring matters relevant to such legal instruments to the attention of the Council of Ministers. The High Commissioner may also bring relevant matters to the attention of the Council of Ministers and may participate in the discussions as a non-voting member. The High Commissioner may also call a special meeting of the Council for that purpose. Other entities or persons may bring matters to the attention of the Council according to the procedures adopted by the Council for that purpose.

Chapter III. The High Commissioner.

Article 9.

1. The High Commissioner shall be the chief executive for Convention implementation and shall be assisted by a staff and subsidiary organs which he may require and appoint. He shall act as the Commission's primary representative and the functions of his office shall be financed through the Council of Ministers.
2. The High Commissioner shall be appointed by the Council of Ministers for a term of three years or until such time as he is replaced by a vote of the Council thereafter.
3. The High Commissioner shall perform such other functions as are entrusted to him by the Council of Ministers or the Hearings and Arbitration Council.

Article 10. The High Commissioner, his staff and subsidiary entities shall perform the executive functions in such a manner that the office shall remain international in nature. Each Party to the Covenant undertakes to respect the character of the responsibilities of the High Commissioner and to lend necessary support to his efforts.

Article 11. The High Commissioner shall coordinate his activities with other entities of the Commission and may communicate with such entities or persons as he deems necessary for the performance of the responsibilities of his office. His powers under Article 8 are further recognized in this regard.

Article 12.

1. The High Commissioner can direct staff and subsidiary activity for the purpose of Convention implementation, and with the approval of the Council of Ministers he may send such subsidiary organs as he deems necessary for the proper execution of his duties into any country which is a Party to this Covenant. He may also send subsidiary organs into any country upon request.
2. There shall exist Protection Agencies which will perform such investigative, protective, humanitarian, and supervisory activities as directed by the High Commissioner. The Protection Agencies shall be set up by the High Commissioner with the approval of the Council of Ministers in such a manner that they are able to function on a continuous basis. The Protection Agencies shall have all the power and responsibilities of a Protecting Power under the 1949 Geneva Conventions, except that their activities shall at all times reflect the international character of the office of the High Commissioner, and they shall coordinate their activities with those of the ICRC.
3. There shall exist Convention Implementation Advisers who may

serve under the direction of the High Commissioner as national implementing advisers to consenting Parties to the Covenant or other entities as may be required. The Convention Implementation Advisers shall coordinate their activities with other entities of the Commission, but shall remain under the direction of the High Commissioner and shall reflect the international character of his office at all times.

Article 13. The High Commissioner can request that reports of law implementation be made by Parties to the Covenant and can initiate studies or investigations through his staff and subsidiary organs, through the two primary advisory bodies to the Council of Ministers, or through the Hearings and Arbitration Council.

#### Chapter IV. Hearings and Arbitration Council.

Article 14. The Hearings and Arbitration Council shall operate as the primary conciliation organ of the Commission and shall consist of such members as are appointed by the Council of Ministers for a term of three years or until replaced.

Article 15.

1. The Hearings and Arbitration Council may conduct formal hearings into any matter at the request of either the High Commissioner or the Council of Ministers; and may arbitrate any matter brought for its decision by consenting Parties to the Covenant, which Parties shall be bound to comply with the decision.

2. The Hearings and Arbitration Council shall establish rules of procedure which are approved by the Council of Ministers.

Article 16. Nothing in Articles 14 or 15 shall preclude the use of other methods of conflict resolution or conciliation available to the Parties to the Covenant, nor shall either article impair the obligations of Parties to the 1949 Geneva Conventions to implement the law in all circumstances and to utilize conciliation methods as necessary.

#### Chapter V. Miscellaneous Provisions.

Article 17. The provisions of this Covenant are without prejudice to the responsibilities of Parties to the 1949 Geneva Conventions or the provisions of the Charter of the United Nations and the respective responsibilities of its various entities.

## Article 18.

1. The Commission shall enjoy in the territory of each of the Parties to the Covenant such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.
2. Representatives of the Council of Ministers and officials of the Commission shall enjoy such privileges and immunities as are necessary for the exercise of their organizational functions.

## Article 19.

1. The present Covenant is open to signature and ratification by any Party to the 1949 Geneva Conventions and its Protocols or amendments.
2. Instruments ratified shall be deposited with the Swiss Federal Council and the Secretary General of the United Nations.
3. The present Covenant shall enter into force three months after the date of deposit with the Swiss Federal Council of the thirty-fifth instrument of ratification.
4. The present Covenant, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations and made available by the Secretary General.
5. Revocation shall be made in writing in accordance with the relevant provisions of the 1949 Geneva Conventions.
6. No reservations to the articles of this Covenant will be accepted.

IN WITNESS WHEREOF:

## ANNEX B

PROTOCOL TO THE 1949 GENEVA CONVENTIONS, NO. 3

Each High Contracting Party undertakes to enact any legislation necessary to provide effective judicial remedies for any person protected by the Conventions. In all circumstances the individual right to effective relief and compensation for infringement of his rights under the Conventions shall be respected, implemented, and protected by each High Contracting Party.

Any violation of any article of the Geneva Conventions which results in direct injury to a person protected under the Conventions can constitute the basis for an individual cause of action as guaranteed here by the High Contracting Parties. The cause of action can be against another individual, group, organization, or against the state itself. The individual right of action shall not affect any other liability which an individual, group, organization, or High Contracting Party incurs. Furthermore, if an individual has exhausted procedures implemented under the present Protocol, he may petition appropriate international bodies for relief or action.